TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]118

A. L. BRACHT, PETITIONER,

vs.

SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

PETITION FOR CERTIORARI FILED JUNE 2, 1919.

CERTIORARI AND RETURN FILED NOVEMBER 28, 1919.

(27,149)

(27,149)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 395.

A. L. BRACHT, PETITIONER,

vs.

SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1920.

1 In the Supreme Court of the United States.

No. —.

A. L. BRACHT, Petitioner,

vs.

SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY, Respondent.

Transcript of Record from the Kansas City Court of Appeals on Petition for Certiorari to the Kansas City Court of Appeals of the State of Missouri.

STATE OF MISSOURI, *set:*

Be it remembered, that heretofore, to-wit, on the third day of May, 1918, there was filed in the office of the clerk of the Kansas City Court of Appeals, transcript of appeal in the cause wherein A. L. Bracht was respondent and San Antonio and Aransas Pass Railway Company was appellant, in words and figures following, to-wit:

2 Be it remembered that on the 24th day of the regular November term, 1917, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 11th day of December, 1917, the following proceedings were had and made of record before Hon. O. A. Lucas, Judge of Division No. 2 in the cause entitled:

No. 113,087.

A. L. BRACHT, Plaintiff,

v.

SAN ANTONIO AND ARANSAS PASS RY. CO., Defendant.

Now on this day comes the parties hereto and by attorneys, this cause now coming on for trial, come the following jury, to try the issues herein joined, to-wit: Martin H. Devault, Flavius J. Neal, Oscar L. Shane, Arch Rhea, Ulysses G. Hayes, Luther O. Bell, William H. Benson, Leroy Hawkins, Chas. C. Lowe, Willis M. Prather, Thomas L. Hill, A. D. Howell, twelve good and lawful men chosen from the body of the county severally sworn and empaneled, the evidence being concluded, the jury is allowed to separate under the usual charge of the court until to-morrow morning at 9:30 o'clock.

On the 25th day of the regular November term, 1917, the same being the 12th day of December, 1917, the following further proceedings were had and made of record, to-wit:

No. 113,087.

A. L. BRACHT, Plaintiff,

v.

SAN ANTONIO AND ARANSAS PASS RAILROAD COMPANY.

Now again on this day come the parties hereto and by attorneys, and the jury herein, reading of the instructions of the court to the jury and arguments of counsel for the respective parties, the
3 jury retired to deliberate upon a verdict, and after due deliberation the jury return the following verdict, to-wit:

We, the jury, find the issues for the plaintiff and assess his damages at four hundred eighty-one and 85/100 dollars ($481.85).

WILLIS M. PRATHER.
THOS. L. HILL.
CHARLES C. LOWE.
LUTHER O. BELL.
M. H. DE VAULT.
F. J. NEEL.
A. R. RHEA.
O. L. SHANE.
U. S. HAYES.

Wherefore it is ordered and adjudged by the court, that the plaintiff have and recover of and from the defendant and the United States Fidelity & Guaranty Company surety on defendant's appeal bond herein the sum of four hundred eighty-one and 85/100 dollars ($481.85) together with all costs accrued and expended herein and have therefor execution.

On the 27th day of the regular November term, 1917, the same being the 14th day of December, 1917, the following further proceedings were had and made of record, to-wit:

No. 113,087.

A. L. BRACHT, Plaintiff,

v.

SAN ANTONIO AND ARANSAS PASS RY. CO., Defendant.

Now on this day defendant files motion for new trial, and also motion in arrest of judgment herein.

4 On the 12th day of the regular March term, 1918, the same being March 25rd, 1918, the following further proceedings were had and made of record, to-wit:

No. 113,087.

A. L. Bracht, Plaintiff,

v.

San Antonio and Aransas Pass Railway Company, Defendant.

Now on this day come the parties hereto by attorneys, and the motion of the defendant for a new trial of this cause, having been heretofore heard and fully considered by the court the same is by the court overruled; to which action and ruling of the court defendant excepts.

And thereafter, on the same day, defendant's motion in arrest of judgment, having been heretofore heard and fully considered, the same is, by the court overruled; to which action and ruling of the court defendant excepts.

On the 42nd day of the March term, 1918, the same being the 27th day of April, 1918, the following further proceedings were had and made of record, to-wit:

No. 113,087.

A. L. Bracht, Plaintiff,

v.

San Antonio and Aransas Pass Railroad Company, Defendant.

Now on this day defendant files application and affidavit for an appeal herein, and the same is by the court allowed to the Kansas City Court of Appeals, and the appeal bond to be fixed in this cause is by the court fixed at the penal sum of twelve hundred ($1200.00) dollars, thereupon defendant files said appeal bond with defendant as principal, and the United States Fidelity & Guaranty Company as surety thereon, in the sum of twelve hundred ($1200.00) dollars, which bond is by the court approved, defendant is by the court given until on or before the last of the May term, 1918, in which to present and file its bill of exceptions herein.

State of Missouri,
County of Jackson, ss:

I, James B. Shoemaker, clerk of the Circuit Court within and for the county and state aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the judgment and order allowing appeal in the cause entitled A. L. Bracht, plaintiff, against San Antonio & Aransas Pass Railway Company, defendant, as the same appears of record, in my office, in Book No. 210 at pages 185-187-190-368 and 406.

In witness whereof, I hereunto set my hand and affix the seal of said circuit court at office in Kansas City, this 1st day of May, A. D. 1918.

JAMES B. SHOEMAKER,
Clerk.

[SEAL.] By E. E. ADAMS,
Deputy.

And thereafter, to-wit, on November 20th, 1918, appellant filed in said cause its abstract hereto attached, Exhibit A.

And on November 27th, 1918, respondent filed in said court its additional abstract of record hereto attached, Exhibit B.

And thereafter, to-wit, on the 7th day of December, 1918, the court made and entered of record the following:

6

13140.

A. L. BRACHT, Respondent,

v.

SAN ANTONIO & ARANSAS PASS RY. CO., Appellant.

Now at this day come the parties aforesaid, by their respective attorneys, and after arguments herein, submit this cause to the court on briefs.

And thereafter, to-wit, on February 17, 1919, the court made and entered of record the following:

A. L. BRACHT, Respondent,

v.

SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY, Appellant.

Appeal from Jackson Circuit Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things lost by reason of the said judgment. It is further considered and adjudged by the court that the said appellant recover against the said respondent costs and charges herein expended, and have therefor execution.

And on the same day, the court filed in said cause its opinion in words and figures as follows, to-wit:

No. 13140.

In the Kansas City Court of Appeals, October Term, 1918.

A. L. Bracht, Respondent,

v.

San Antonio & Aransas Pass Ry. Co., Appellant.

Appeal from Jackson Circuit Court.

Plaintiff had a car of tomatoes and cucumbers at Ingleside,
7 Texas. He had an offer from Dallas in the same state of one dollar per crate on the tomatoes and fifty cents per crate on the cucumbers, delivered at Dallas. He thereupon shipped over defendant's road, a carload of these vegetables from Ingleside to Dallas, consigned to himself, and, as he expressed it in testimony, they were "to be sold in transit." For some reason, not appearing, they were not sold and on the day of arrival at Dallas, he ordered the car diverted to Kansas City, Missouri. It was diverted over the M. K. & T. Ry. Co., a new bill of lading being issued by that road from Dallas to Kansas City. They arrived at the latter place in bad condition and he brought this action for damages and recovered judgment both before a justice of the peace and in the Circuit Court on Appeal.

If the shipment was an interstate shipment the case is governed by the Carmack Amendment to the Interstate Commerce law whereby the initial carrier is made liable for damages occurring on connecting lines and the judgment must be affirmed. On the other hand, if the shipment was intrastate the judgment must be reversed.

The bill of lading issued by defendant at Ingleside was merely for a shipment to Dallas. There was no mention of any other destination. But under the tariff rates on file with the Interstate Commerce Commission governing both defendant and the M. K. & T. Ry. Co., recognition is given to the diverting of freight from original destination. And since the shipment was made by plaintiff to Dallas, Texas, and on day of arrival it was, by his order,
8 diverted to Kansas City, Mo., he insists that the shipment was interstate and defendant became liable under the Carmack Amendment.

It is conceded that whether a shipment is interstate or intrastate, is not controlled by the mere fact of it being billed as one or the other; Chic. Mil. & St. P. Ry. Co., 233 U. S. 334, 343; So. Pac. Terminal Co. v. Int. Com. Co., 219 U. S. 498, 527; Ohio R. R. Com. v. Worthington, 225 U. S. 101, 110; Texas & N. O. R. R. Co. v. Sabine Tram Co., 227 U. S. 111, 127; Louisiana R. R. Com. v. Texas & Pac. Ry., 229 U. S. 336, 341. As for instance, if the destination of a shipment originating in the interior is a foreign country, the fact that it was billed from point of origin to a place on the coast in the same state, and there billed on a steamer to the foreign

place, it would be regarded as foreign commerce from the initial point. And so if the shipment is for a state other than the one in which it originated, the fact that it is first billed to some point in the state, thence to be rebilled to destination in the other state, will not change its character as interstate commerce; So. Pac. Terminal Co. v. Int. Com. Com., supra; Ohio R. R. Com. v. Worthington, 225 U. S. supra. So it is summarized in the syllabus to Texas & N. O. R. R. Co. v. Sabine Tram Co., supra, that shipments "on local bills of lading from one point in a state to another point in the same state destined from the beginning for export, under the circumstances of this case, are foreign and not intrastate commerce."

But to make a shipment interstate, it must be a shipment intended for another state; and if so intended it will not be deprived of its interstate character by being billed to an intermediate point in the state of its origin. The initial shipment must be the beginning of an interstate journey; Reynolds v. Railroad, 195 Mo. App. 215, 219, 229; Keithly v. Lack, 195 Mo. App. 143; McCluskey v. Maryville & Northern Ry. Co., 243 U. S. 36. A different rule would make us say that though a shipment is billed intrastate and is intended as intrastate, it will nevertheless become interstate, if from some subsequent consideration it is shipped into another state.

We are cited by plaintiff to a decision of the Interstate Commerce Commission reported in 43 I. C. C. 378, where it seems to be held that the shipper's intention in his shipment "must be a fully ripened and completed intent" which is not formed until "he decides whether the shipment will be disposed of locally, or the transit tariff provisions availed of for further movement; Reynolds v. Railroad, Keithly v. Lack, supra. It is not necessary to say whether that case is in accord with the decisions of the Supreme Court of the United States cited above. But the remarks relied upon find no application to this case since plaintiff here had only one intent "fully matured," and that was to ship to Dallas. And, as we have already suggested, any other rule would make an intrastate shipment impossible.

The vegetables in this controversy were actually shipped and billed from Ingleside to Dallas, Texas. That they were not intended to be shipped into any other state conclusively appears. After the car arrived at destination the shipper changed his mind, entered into a new engagement with the M. K. & T. Ry. Co., whereby he shipped the car to Kansas City, Missouri. Under no consideration could this be held to relate back to the origin of the original shipment and change its character; Gulf, Colorado & Santa Fe Ry. Co. v. Texas, 204 U. S. 403; Illinois Grain to Chicago, 40 I. C. C. 124. It is stated by counsel that the first of these cases has been departed from in subsequent decisions. We do not find it so. On the contrary it has been frequently cited with approval as will appear by cases herein cited. A reference to McCluskey v. Maryville & Northern Ry. Co., 243 U. S. 36, cited above is instruc-

tive. The case is not like this on its facts, but the rule involved there and the reasoning applied is applicable.

The judgment is reversed. All concur.

JAMES ELLISON.

And thereafter, to wit, on February 26th, 1919, respondent filed in said cause his motion for rehearing, in words and figures as follows, to wit:

In the Kansas City Court of Appeals, at the October Term, 1918.

No. 13140.

A. L. Bracht, Respondent,

vs.

San Antonio and Aransas Pass Railway Company, Appellant.

Motion for Rehearing.

Now comes the respondent and moves the court to grant a rehearing in the above entitled cause for the reason that the decision of the court is in conflict with controlling decisions of the Supreme Court of the United States and of Missouri, to which the attention of the court was not called in the brief.

HAL E. LEBOEUF,
L. A. LAUGHLIN,
Attorneys for Respondent.

11 *Suggestions in Support of Motion.*

As this case on appeal will go to the Federal Court from this Court, the controlling decisions of the Federal Courts as well as the Supreme Court of Missouri must be taken into consideration in passing upon the motion for rehearing.

In the case at bar the opinion makes the intention of the shipper at the time the car was delivered to the defendant railroad determinative of the question whether it was an interstate shipment or an intra-state shipment. In other words, if we understand the opinion correctly, if the plaintiff had testified at the trial that it was his intention at the time the car was delivered to the defendant railroad to divert it in transit to a point outside of Texas, then it would have been an interstate shipment, but in the absence of such intention the destination named in the bill of lading was controlling. This intention need not be communicated to the railroad company, and thus we have so important a question as to whether a shipment is interstate or intrastate depend upon the mental process of the shipper, which he alone knows anything about.

This doctrine has been expressly repudiated by the Supreme Court of the United States in G. C. & S. F. Ry. Co. v. Texas, 204 U. S. 403, where the court said:

"In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made to know whether it was bound to obey the state or federal law, or, obeying the former, find itself muleted in penalties for not obeying
12 the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract."

If the court means that the intention of the parties must be learned from the contract of shipment, then it is important to know just what that contract was. That contract provided for a shipment from Ingleside, Texas, to Dallas, but the tariff rule, which is a part of the contract of shipment, provided that the car might be diverted within forty-eight hours after arriving at its first destination, in which case a through rate would be given from point of origin to final destination. The car was diverted by the shipper within forty-eight hours after it arrived at Dallas, and the through rate given. The car was not delivered to the plaintiff at Dallas. It remained all the time in the possession of the carrier, and at no time from the time the car left Ingleside until it arrived at Kansas City did the plaintiff have actual or constructive possession of it. The possession of the carrier during all this time was not because of any refusal on the part of the consignee to accept delivery, but was strictly in accordance with the contract of shipment. The Federal Courts hold that unless the shipment has been delivered to the consignee, is physically present and in the possession of the shipper at the time of the re-billing, the second shipment is a continuation of the first and is not a new contract of shipment.

C. M. & St. P. Ry. Co. v. Iowa, 233 U. S. 334.
G. C. & S. F. Ry. Co. v. Texas, 204 U. S. 403.
A. T. & S. F. Ry. Co. v. Harold, 241 U. S. 371.

13 In the foregoing cases the question whether the rebilling was a second contract of shipment or a continuation of the first, depended upon whether there had been a delivery under the first contract of shipment, in other words, whether the first contract of shipment had been completed.

In U. S. v. Phila. & R. Ry. Co., 232 F. R. 949, Judge Thompson of the United States District Court for the Eastern District of Pennsylvania, said:

"If, for instance, a shipment were made over the defendant's railroad from the coal regions in Pennsylvania to a point in New Jersey to a certain consignee, and that consignee, after delivery, reshipped from the point in New Jersey to another point in New Jersey under a new consignment to a different consignee, the interstate through rate from the coal regions in Pennsylvania to the second point in New Jersey would not apply, but the intrastate rate would apply from the first to the second point in New Jersey."

In McFadden v. Ala. G. S. R. R. Co., 241 Fed. 563, in the United States Circuit Court of Appeals for the Third Circuit plaintiff in error bought cotton at points in Alabama, and shipped it to Birmingham, Alabama. At Birmingham the uncompressed cotton was

unloaded, compressed by the carrier in accordance with a right reserved in tariffs filed and as a part of the transportation service rendered, and then reloaded for continued shipment. At Birmingham the original bills of lading were surrendered and the shipments rebilled by plaintiffs to points beyond the state. In the opinion the court said:

14 "Applying these well established principles to the facts of this case it appears in the instance we have cited as illustrative of all shipments in issue, that the cotton was shipped upon an intrastate rate to Birmingham, where it remained in the possession and control of the carrier subject to be divested by the defendants availing themselves of a provision in the bills of lading directing delivery to their order. This the defendants might have done but never did. Therefore we are to determine the character of the transportation by what was intended, and by what was done with the commodity transported, rather than by what might have been done with it. What the defendants did was not to call for delivery and acquire possession according to their right under the bill of lading, but to leave the cotton with the carrier for compression (a right reserved by it and manifestly to be employed only when cotton was intended to be carried further) and to direct its transportation by new bills of lading to points beyond the state. We are therefore of opinion that the District Court permitted no error in finding the transportation in question interstate in character."

This same question recently came before the United States Circuit Court of Appeals for the Sixth Circuit in Settle v. Baltimore & O. S. W. R. Co., 249 Fed. 913. In that case the question arose whether cars of lumber purchased by plaintiff in error at various southern points and billed to Oakley, Ohio, and then re-billed to Madisonville, Ohio, were interstate shipments between Oak-

15 ley and Madisonville. All the federal authorities on this question are reviewed in the opinion and the court said:

"While the question is not free from difficulty, upon a careful consideration of the authorities we are disposed to think that the character of the shipment from Oakley to Madisonville is to be ultimately tested by the consideration whether or not there was an actual good faith delivery of the shipment to the consignees at Oakley, and actually a new and independent shipment therefrom by defendants to Madisonville while the lumber was physically present and in their possession, and that the effect of such good faith delivery, possession and independent reshipment is not as a mere matter of law, converted into an interstate shipment by the existence of an original continuing intention to so reship in intrastate commerce for the saving of expense."

In Lusk v. Atkinson, 268 Mo. 109, the Supreme Court of Missouri had occasion to pass upon a question somewhat similar, and the court quoted with approval the authorities which emphasize delivery such as the cases of G. C. & S. F. Ry. Co. v. Texas, and C. M. & St. P. Ry. v. Iowa, supra.

Suppose that plaintiff had sold this car to a man in Dallas, f. o. b.

destination before the car left Ingleside and in the contract of sale had provided that the purchaser could have the option to change the point of delivery within forty-eight hours after arrival of the car at Dallas, that the purchaser exercised his option within that
16 time and directed delivery to be made at Kansas City, would not this change in the place of performance of the contract be in accordance with the contract so that the laws of Missouri would govern the performance?

The question involved in the case at bar is one of great importance to shippers. Perishable products such as oranges from California and Florida and early vegetables from the south are started on their journey to markets without being sold and hence consigned to shipper's orders at some point within the state where the shipment originated. By so doing the commodity can be sold in transit and a saving in time made in getting it to the market. Whether such a shipment is interstate or intrastate is one of practical importance not only on account of the rate but also on account of loss or damage to the shipment.

For the foregoing reasons, we think the court has erred in its decision and a rehearing should be granted.

Respectfully submitted,

HAL R. LEBRECHT,
L. A. LAUGHLIN,
Attorneys for Respondent.

Received a copy of the foregoing motion and suggestions this 25th day of February, 1919.

LATHROP, MORROW, FOX & MOORE,
Attorneys for Appellant.

And on the same day, the said respondent filed in said cause his motion to transfer cause to Supreme Court, in words and figures following, to-wit:

17 In the Kansas City Court of Appeals, at the October Term, 1918.

No. 13140.

A. L. BRACHT, Respondent,

vs.

SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Appellant.

Motion to Transfer to the Supreme Court.

Now comes the respondent and moves the court to order the transfer of this cause to the Supreme Court of Missouri for the reason that the decision of the court is in conflict with controlling decisions

of the Supreme Court of the United States and of the Supreme Court of Missouri, as follows:

C. M. & St. P. Ry. Co. v. Iowa, 233 U. S. 334.
G. C. & S. F. Ry. Co. v. Texas, 204 U. S. 403.
A. T. & S. F. Ry. Co. v. Harold, 241 U. S. 371.
Lusk v. Atkinson, 258 Mo. 109.

HAL K. LEBRECHT,
L. A. LAUGHLIN,
Attorneys for Respondent.

Received a copy of the foregoing motion this 25th day of February, 1919.

LATHROP, MORROW, FOX & MOORE,
Attorneys for Appellant.

And thereafter, to-wit, on March 12th, 1919, the court made and entered of record in said cause the following:

A. L. BRACHT, Respondent,
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Appellant.

Now, at this day, the court here having considered and fully understood the respondent's motion for a rehearing and to
18 transfer this cause to the Supreme Court, doth consider and adjudge that the said motions be and the same are hereby overruled.

And thereafter, to-wit, on March 25th, 1919, the said respondent filed in the office of the clerk of the Supreme Court of Missouri, which is the highest court of law and equity in said state, his application for a writ of certiorari, praying said court to direct the Kansas City Court of Appeals to certify to said Supreme Court its record and proceedings herein, for review by said Supreme Court.

And thereafter, to-wit, on the 10th day of April, 1919, the application of the respondent to the said Supreme Court of Missouri for a writ of certiorari herein, was by said court denied.

STATE OF MISSOURI, *sct:*

I, L. F. McCoy, clerk of the Kansas City Court of Appeals, do hereby certify that the foregoing is a true and correct copy of the record and proceedings had and made of record in the above entitled cause, as fully as the same remain of record and on file in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court hereto. Done at office in Kansas City, Missouri, this 20th day of May, 1919.

[Seal Kansas City Court of Appeals.]

L. F. McCOY,
Clerk, Kansas City Court of Appeals.

19 EXHIBIT "A."

In the Kansas City Court of Appeals, October Term, 1918.

December Call.

No. 13140.

A. L. BRACHT, Respondent,

vs.

SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY, Appellant.

Appeal from Jackson County Circuit Court.

Hon. O. A. Lucas, Judge.

Appellant's Abstract of Record.

Lathrop, Morrow, Fox & Moore, Attorneys for Appellant.

Filed Nov. 20, 1918. L. F. McCoy, Clerk.

20 In the Kansas City Court of Appeals, October Term, 1918.

December Call.

No. 13140.

A. L. BRACHT, Respondent,

vs.

SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY, Appellant.

Appeal from Jackson County Circuit Court.

Hon. O. A. Lucas, Judge.

Appellant's Abstract of Record.

This suit was instituted in the Justice Court of S. R. Layton, Jackson County, Missouri, on the 28th day of February, 1916, by the filing of a statement in words and figures as follows (omitting caption and signatures:

21 To damages in delivering at Kansas City, Missouri, a car of tomatoes and cucumbers A. R. T. No. 14068, in a damaged condition, which was delivered in good condition to defendant at Ingleside, Texas, on or about June 10, 1915, for transportation to Houston, Texas; and thereafter was diverted to Kansas City, Missouri $492.00

Thereafter and on June 2, 1915, the cause on change of venue was sent to John H. Pollock, Justice of the Peace, Jackson County, Missouri. Thereafter the transcript was duly and regularly filed in said court. Thereafter and on the 24th day of January, 1917, judgment was entered by said Justice in favor of the plaintiff and against the defendant, for $492.00. Thereafter and in due time an appeal was duly prosecuted by the defendant to the Circuit Court of Jackson County, Missouri, at Kansas City, where the transcript was duly and regularly filed, and notice of appeal duly and regularly given.

The suit having been instituted in the Justice Court, no answer or other pleading was filed by the defendant in either the Justice or the Circuit Courts.

Record Entries.

Trial.

The case was tried at the November Term, 1917, of the Circuit Court of Jackson County, Missouri, at Kansas City, before the Honorable O. A. Lucas, Judge, and a jury. The trial began on
22 the 11th day of December, 1917, resulting in a verdict in favor of the plaintiff, in the sum of $481.85, which was rendered by the jury on the 12th day of December, 1917.

Motions for a New Trial and in Arrest of Judgment.

Thereafter on the 14th day of December at the said November term of said court and within four days after the rendition of said verdict and judgment, the defendant filed its motion for a new trial, and its motion in arrest of judgment, and record entry was duly made of said filing (motions shown in the bill of exceptions printed herein).

Thereafter and on the 23rd day of March, 1918, and during the March, 1918, Term of said court, the said motions for a new trial and in arrest of judgment filed by defendant were by the court duly heard and overruled; and judgment was finally rendered on the verdict in favor of the plaintiff and against the defendant for $481.85 on March 23, 1918, and record entry duly made of said order.

Appeal.

All necessary and proper steps were duly and timely taken by defendant appellant to perfect its appeal to this court, and such appeal has been duly taken and all necessary orders therefor were duly made and entered of record.

23 *Bill of Exceptions.*

The bill of exceptions was duly ordered and filed by which the testimony given at the trial and the rulings of the court thereon, the

instructions of the court, both given and refused, the motions for a new trial and in arrest of judgment, and the overrulings of said motions, and defendant's exceptions to all adverse rulings of the court on all the foregoing matters were duly saved and appear therein in a duly filed bill of exceptions as follows.

(Note: The appellant is presenting in this abstract only so much of the evidence from the Bill of Exceptions as it deems necessary for a full understanding of the questions presented to this court.)

Plaintiff to sustain the issues upon his part, offered and introduced evidence, oral and documentary, as follows, to-wit:

A. L. Bracht, a witness on the part of the plaintiff, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposes and says:

Direct-examination.

Read by Mr. Bolinger:

Q. Please state your name, age and place of residence.

A. A. L. Bracht; age 42 years; Rockport, Texas.

Q. Please state whether or not on or about the 10th day of June, 1915, you assisted in loading car ART 14068 at Ingleside, Texas?

A. Yes.

24 Q. Please state fully what you had to do with loading said car.

A. I gave instructions as to the loading of the car and also inspected the car after having been loaded.

Q. With what was this car ART 14068 loaded?

A. Tomatoes and cucumbers.

Q. How many crates of tomatoes were loaded into this car?

A. Seven hundred and eighty.

Q. How many crates of cucumbers were loaded into this car?

A. Ninety-four.

Q. Describe fully the condition of the cucumbers at the time they were loaded in said car?

A. They were in sound shipping condition.

Q. Where were these cucumbers and tomatoes obtained which were loaded in this car?

A. From the growers of the Pioneer Truckers Association at Ingleside, Texas.

Q. What kind of a car was this: a box car, a refrigerator car or what kind?

A. A refrigerator car.

Q. Was car ART 14068 pre-iced, that is iced before loading?

A. Yes, it was pre-iced.

Q. What were these tomatoes worth per crate at Ingleside, Texas, on June 10th, 1915?

A. Eighty cents per crate.

Q. What were cucumbers worth per crate at Ingleside, Texas, on June 10th, 1915?

A. Twenty-five cents per crate.

Q. Was there a bill of lading issued covering this shipment?

A. Yes.

Q. Who signed this bill of lading covering this shipment at Ingleside, Texas, on behalf of the shipper, the plaintiff?

A. W. L. Muckleroy.

Q. Who signed the bill of lading issued at Ingleside, Texas, on behalf of the railroad company?

A. N. P. Hatchett.

25 Q. When did he sign the bill of lading?

A. On June 10th, 1915.

Q. What was his connection with the railroad company?

A. He was local agent for the railroad company.

Q. What railroad companies do business at Ingleside, Texas?

A. The San Antonio and Aransas Pass Railroad Company only.

Q. Is there more than one railroad at that point?

A. No.

Q. Were you acquainted with the railroad company's agent's signature which appeared on the original bill of lading issued at Ingleside, Texas, covering this shipment?

A. Yes.

Q. What railroad company issued that bill of lading?

A. The San Antonio & Aransas Pass Railway Company.

Q. Was it a straight bill of lading or shipper's order bill of lading?

A. It was a straight bill of lading.

Q. Who was the consignor or shipper at Ingleside, Texas?

A. I was.

Q. To whom was the shipment consigned?

A. To me.

Q. To where was it shipped?

A. To Dallas, Texas.

Q. What was the destination named in the original bill of lading issued at Ingleside, Texas?

A. Dallas, Texas.

Q. Have you the original bill of lading? If so, have it marked Exhibit 1 by the notary, attached hereto and made a part hereof.

A. I have not the original bill of lading.

Q. Have you a copy of the original bill of lading, if so,

26 please attach hereto, having the notary mark it Exhibit 2, attaching it hereto and making it a part hereof.

A. I have it and hand it to the notary.

Plaintiff at this point offers in evidence this Exhibit, and the same was marked by the reported plaintiff's Exhibit 1.

(NOTE: The following are the pertinent parts of said "Exhibit 1"):

Bill Lading No. 60.

San Antonio and Aransas Pass Railway Company.

Straight Bill of Lading.

(For Use Only Between Points Within the State of Texas.)

June 10, 1915.

Received from A. L. Bracht at Ingleside the following packages, contents and value unknown, in apparent good order, except as noted, marked and numbered as per margin, to be transported from Ingleside to (Must be a station on this line) Dallas, Tex., (Must be a station on this line) there to be delivered to consignee, unless destined beyond, and if destined beyond, then the San Antonio and Aransas Pass Railway Company agrees, as Agent for the shipper, to tender the shipment to a connecting common carrier, enroute to destination.

It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed by any carrier shall be subject to all the conditions, whether printed or written, herein con-
27 tained and which are agreed to by the shipper and accepted for himself and his assigns.

Conditions.

Section 2. If shipment is destined to a point off this company's road, it is agreed that this is no contract for through shipment, and this company's liability as a common carrier shall determine on tender of delivery to a connecting carrier. * * *

Section 5. Property not removed by the party entitled to receive it within the time required by law, or the rules and regulations of the Railroad Commission of Texas, after notice of its arrival has been duly sent or given, may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to legal charges as fixed by the Railroad Commission of Texas, and to carrier's responsibility as warehousemen only; or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at the owner's risk, and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

Section 12. This bill of lading is given subject to correction as to rate, weight and classification so as to conform to the rates, rules and regulations prescribed by the Railroad Commission of Texas.

Section 13. No Agent of this Company has authority to make an oral contract for the shipment of freight, and this bill of lading contains all the provisions of the contract of shipment between the

parties hereto, and no qualifications, alterations, erasures in or additions to the conditions thereof, shall be made except under the written directions of the General Freight Agent, or the
28 Auditor of the Company, attached hereto.

Consigned to A. L. Bracht.
Destination: Dallas, State of Tex., County of —.
Route: Waco, M. K. & T. Car Initial A R T. Car No. 14068.

No. Packages	Description of Articles and Special Marks	Weight Subject to Correction	Class or Check Rate Column
780	crts Toms	17940	
94	crts cukes	4230	

S. L. & C.

Weight Certificate on file.

Refg'n ch'ge $30.00

If charges are to be prepaid, write or stamp here "To be Prepaid." —.
Received $—. None to apply in prepayment of the charges on the property described hereon.
Charges Advanced $—.

N. P. HATCHETT.
Authorized Agent of San Antonio and Aransas Pass Railway Company.

W. L. MUCKLEROY,
Shipper.

Q. What became of the original bill of lading?
A. It was sent to E. H. Combs, at Houston, Texas.
Q. Is the copy of the original bill of lading, which you have attached hereto, being marked Exhibit 2, a correct and true copy of the original bill of lading issued at Ingleside, Texas, covering this shipment?
A. Yes, it is.
Q. To whom did the tomatoes and cucumbers which were shipped in car ART 14068 belong? That is, who was the owner of this shipment?
A. The Pioneer Truckers Association of Ingleside, Texas.
Q. What was A. L. Bracht's connection with the shipment?
A. I was acting as sales agent.
Q. As I understand it, Mr. Bracht is the sales agent for this association and they delivered the tomatoes and cucumbers that went into this shipment to Mr. Bracht for him to sell for the as-
29 sociation—is that correct?
A. That is correct. * * *
Q. Was this car unloaded at the original destination or was it diverted?
A. It was diverted to Kansas City, Missouri.

Q. Attached hereto, mark- Exhibit 3 is a purported telegram sent by A. L. Bracht to George E. Reynolds, please state whether or not you sent the original of which Exhibit 3 is a copy?

A. I did.

Q. Who was George E. Reynolds?

A. Traveling freight agent for the Missouri, Kansas and Texas Railroad.

Q. What railroad company was he connected with?

A. The Missouri, Kansas and Texas Railroad Company.

Mr. Bolinger: I now offer in evidence plaintiff's Exhibit No. 3, as follows:

Western Union Day Letter.

June 12th, 1915.

Geo. E. Reynolds, Comd. Agt. Katy,
Houston, Texas:

ART fourteen naught six eight reported by Sheffield arrived in bad order inspect if good condition divert quick Kansas City to Ginocchio-Jones Fruit Co., confirm. No crates here or Ingleside yet heavy loss.

A. L. BRACHT.

Q. How was this car routed in the original bill of lading?

A. Over the San Antonio and Aransas Pass, care the M., K. & T. at Waco.

Q. Where would the M., K. & T. Railway Company of Texas get this car from the defendant as the car was being transported as routed in the original bill of lading?

A. At Waco, Texas.

Q. Was the car so routed that the M. K. & T. Railway Company of Texas would have possession of the car upon its arrival at Dallas, Texas?

A. It was.

Q. Did you receive any reply to your telegram (Exhibit 3 hereto attached) from Mr. Reynolds?

A. I did.

Q. Attached hereto, marked Exhibit 4, is a purported telegram, please state whether or not Exhibit four is the original wire you received from Mr. Reynolds in reply to your telegram to him, copy of which is hereto attached and marked Exhibit 3?

A. It is.

Q. Who was E. H. Coombs?

A. He was general freight agent for the M. K. & T. Railway of Texas at Houston, Texas.

Q. What was his connection with the M. K & T. Railway Company of Texas?

A. General freight agent at Houston, Texas.

Q. Was he agent for that company at Rockport, Texas, at the time this shipment moved?

A. I don't know.

Mr. Bolinger: Now, we offer in evidence the Exhibit No. 4:

Western Union Telegram.

8:40 P. M.,
Houston, Tex., 6-12-15.

A. L. Bracht,
Rockport:

Wire date have requested diversion ART fourteen naught six eight as requested.

GEO. E. REYNOLDS.

21 Q. Attached hereto and marked Exhibit 5 is a purported telegram to you from Mr. Coomb? Did you receive that?
A. I did.
Q. When?
A. June the 16th, 1915.
Q. Is that the original telegram?
A. It is.

Mr. Bolinger: We offer in evidence this Exhibit 5.

Western Union Telegram.

Houston, Tex., 6-16-15.

A. L. Bracht,
Rockport:

ART fourteen naught six eight diverted to Kansas City.

E. H. COOMBS.

Q. Attached to, marked Exhibit 6 and made a part hereof is an instrument purporting to be a telegram from Mr. Coombs to you; did you receive that telegram?
A. I did.
Q. When?
A. On June the 18th, 1915.
Q. Is Exhibit 6 the original telegram?
A. It is.

Mr. Bolinger: We offer this Exhibit 6:

Western Union Telegram.

Houston, Tex., 6-16-15.

A. L. Bracht:

ART 14068 arrived Kas. City six thirty yesterday morning mail me original lading.

E. H. COOMBS.

Q. Did you mail E. H. Coombs the original bill of lading covering this shipment?
A. I did.

Q. This bill of lading that you mailed to Mr. Cwando in compliance with his telegram, Exhibit 5, was that the original bill
32 of lading covering this shipment which was issued at Ingleside, Texas?

A. It was.

Q. Attached hereto is an instrument marked Exhibit 7, which is made a part of this deposition which purports to be an exchange bill of lading, from whom did you receive this?

A. From E. H. Cwando.

Q. How long after you mailed the bill of lading issued at Ingleside, Texas, did you receive this exchange bill of lading (marked Exhibit 7)?

A. About a week later.

Q. How did you receive Exhibit 7, through the mail or how?

A. Through the mail.

Q. Are you acquainted with E. H. Cwando's signature?

A. Not familiarly acquainted with it.

Mr. Bolinger: Plaintiff offers in evidence Exhibit 7, being the exchange bill of lading. (Note: the pertinent parts are as follows):

Missouri, Kansas & Texas Ry Co. of Texas.

Straight Bill of Lading—Original—Not Negotiable.

Received, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at Houston, Texas, June 24, 1915, from A. L. Bracht, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed
as to each carrier of all or any of said property over all or
33 any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

Consigned to Gimmechio Jones Fruit Co.
Destination: Kansas City, State of Mo.
Route: SA&AP, MK&T.
Car Initials: ART.
Car No. 14098.

No. packages.	Description of articles and special marks.	Weight (subject to correction.)
780	crates tomatoes	17940
94	crates cucumbers	4230
		22170

SA&AP
Weight certificate on file.

Refrigeration Charges $200.00

Issued in lieu of SA&AP Ingleside, Texas, B. L. No. 69 dated June 10th, bearing Internal revenue stamp.

E. H. CUMMINS,
Agent.

Q. Did you make this shipment to fill a sale or was it consigned to Dallas, Texas, to be sold for your account?
A. It was consigned to Dallas, Texas, to be sold in transit.
Q. If you had had this shipment sold what was myonee price?
A. I had an offer of one dollar on tomatoes and fifty cents on cucumbers, delivered at Dallas, in sound condition.
Q. Was that the price delivered at Dallas or F. O. B. Ingleside, Texas?
A. This price was delivered at Dalias.
Q. What would have been the freight from Ingleside, Texas, to Dallas, Texas.
A. $75.00 on the car.

31 Cross-examination.

By counsel for defendant, read by Mr. Hamilton:

Q. Were you present when this car was loaded?
A. I think so, as I was at Ingleside every afternoon when cars were loaded during that season.
Q. You were acting as agent of the Pioneer Truckers, were you not?
A. Yes.
Q. Working on a commission basis?
A. Yes.
Q. Your personal interest in each car, that is your financial interest, was not as great under this arrangement as when you shipped on your own account, was it?
A. It varied.
Q. How were the funds of the association handled?
A. We paid all funds over to the association.

Q. Were not tickets or checks issued to individual members showing the amount shipped by them and their pro rata share in each car?

A. Yes.

Q. Were you interested in knowing whose vegetables were in any particular car?

A. To a certain extent I was, because this association was composed of the oldest truck growers with the longest experience and the best crops and whose reputation for good packs was established.

Q. But that was your only interest was it not?

A. This was the first year we had handled the association account on a commission basis and we used all our best efforts to make the best possible showing for the association.

Q. In other words, you wanted to get as much out of each car as you could, not only to increase your commission but also to insure you having the handling of the association business the following year? Is that correct?

A. That is correct.

35 Q. When you sold a car for the association you deducted your commission and paid over the balance to the association, did you not?

A. No, the full amount was turned over to the association and my commission later paid to me.

MARTIN UNGERLEIDER, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Lebrecht:

Q. Your name is Martin Ungerleider?

A. Martin Ungerleider is my name, yes, sir.

Q. Where do you live?

A. I live 2418 Charlotte street.

Q. How long have you lived in Kansas City?

A. I have lived here ever since I have been born, twenty-four years.

Q. What business are you in?

A. I am in the produce business at the City Market.

Q. Did you handle a car—by handling I mean sell a car of tomatoes and cucumbers in July, 1915, car A. R. T. 14068?

A. Not on June 15—June 17 we got the car.

Q. How many crates of tomatoes were in the car?

A. My check of that car of those tomatoes was 780 crates.

Q. 780 crates?

A. Of tomatoes.

Q. How much did you get for these 780 crates of tomatoes?

A. No, of course that is wrong, yes, I didn't see the extras—the total sales out of the tomatoes was $310, that's it.

Q. $310?

A. Yes, sir.

Q. Was that all the money you received from the sale of
36 these 780 crates of tomatoes?

A. That was all, yes, sir.

Q. Did you sell 94 crates of cucumbers?

A. I sold those, yes, sir, for $15.

Q. Tell the court and jury whether that is all they were worth or not?

A. Why, I believe they were, yes, sir, on the 94 crates.

(NOTE.—The balance of the testimony of this witness simply goes to the condition of the shipment on arrival at Kansas City. It has no material bearing on the issues presented in this appeal, therefore it is not reproduced in the records.)

Mr. Lebrecht: For the purpose of this trial it is agreed and stipulated, that the witness, if present, would testify to the facts as follows: That this car arrived at Dallas, Texas, at 7 a. m., on June 12, 1915; that the bunkers were seven-eigths full of ice; that the car left Dallas at 7:05 p. m. on June 15; that the car was re-iced at Dallas on June 12 with 3000 pounds of ice; that the car was not iced on the 13th; that the car was iced on the 14th with 4200 pounds of ice, and re-iced on the 15th with 1200 pounds of ice—all at Dallas, Texas. That is what their testimony would show if they were present.

It is further agreed, if the witness was present, he would testify that the car arrived in Kansas City, that is at the Rosedale yards, in Rosedale, at 6:30 a. m. on the 17th of June, 1915, and that it was set on the team track of the M., K. & T. Railroad Company about 8 a. m., and the consignee was notified at 8:45 a. m. on June 17. That the outside temperature, outside of the car, was 80 degrees.

Mr. Mersereau: Right in connection with that, he might state where this team track is.

The Court: He said Fourteenth and Liberty.

37 R. I. KLINE, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Lebrecht:

Q. Tell the court and jury your name.

A. R. I. Kline.

Q. Mr. Kline, you are a man that is experienced in railroad tariffs, reading them?

A. Yes, sir.

Q. And knowing what they are?

A. Yes, sir.

Q. You have worked in tariffs for how long?

A. About ten or eleven years.

Mr. Lebrecht: Plaintiff offers in evidence a portion of page 51 of this tariff, being Texas line basing tariff No. 2 A, as follows—I. C. C., No. 16, effective January 1, 1914.

Witness: I will re a the provision now. "Subject: Rules governing application of tariffs containing additional charges or allowances.

Item No. 165—Rules. Shipments transported under the rates, rules and regulations prescribed in this tariff, and in tariffs made subject to this tariff, shall be subject to such further charges and allowances as are contained in publications of the participating carriers lawfully on file with the Interstate Commerce Commission relating to diversion and reconsignment."

Also on page 4 of the same tariff, showing that the list of issuing lines for which this tariff was issued is the San Antonio and Aransas Pass Railroad Company and the Missouri, Kansas & Texas Railway Company of Texas.

Q. This tariff was in effect at the time of this shipment June 10, 1915?

A. Yes, sir, June 10, that was still effective at that date.

38 Q. Now, we turn to Leland Southwestern Tariff No. 13 S, effective July 19, 1914, and supplement No. 9 Tariff, page 13, A. I. C. C. Supplement No. 9 to I. C. C. No. 1046 changing destination of shipments, items No. 1504 B, reads:

"The destination of any interstate car load shipment may be changed (see exceptions below) either while the freight is in transit or after it reaches its first destination, when the substituted destination is a point where through rates and divisions are in effect, where the route of movement, subject to the following conditions. First, through rates in effect on date of original shipment will govern. Second, when change is made while car is in transit, if the rates to the original and substituted destinations are different, the rate to the substituted destination shall be assessed. Third, when change is made after car has reached first destination: A. The request shall be made within forty-eight hours after it has reached first destination, except that destination on shipments of onions may be changed after the expiration of forty-eight hours subsequent to the arrival of car at first destination. B. The contents of the car shall not have been diverted or removed at first destination. C. If the rates to original substituted destination are different, the higher of the two rates shall be assessed. Exceptions: For rules governing change destination on shipments in connection with the following lines, see their individual publications lawfully on file with the Interstate Commerce Commission, among the lines being Missouri, Kansas & Texas Railway, also Missouri, Kansas & Texas Railway Company of Texas, San Antonio and Aransas Railway.

39 Q. Mr. Kline, can you turn to these tariffs and find what would be the rate, or the local rate from Ingleside to Dallas, Texas, and also the local rate from Dallas to Kansas City?

A. Could not from Ingleside to Dallas, but from Ingleside to Kansas City, we can from that tariff.

Q. You can get the through rate?

A. Through rate, yes.

Q. Find the place where the through rate is shown please.

A. The rate is shown on page 110.
Q. Of what?
A. Of Southwestern Lines Tariff 13 S. I. C. C. 1046.
Q. Is that the joint through rate from Ingleside to Kansas City?
A. It is.
Q. And was it in effect when this shipment moved, June 10, 1915?
A. It was.
Q. What is that through joint rate?
A. It is 50 cents per hundred pounds.
Q. Now, is there a joint refrigeration charge?
A. There is such a refrigeration charge.
Q. What is that, do you know, have you got your tariff here for that?
A. I have not the tariff here for it.
Q. Have you got the tariffs here showing the rate for shipment from Ingleside to Dallas?
A. I have part of it.
Q. From Ingleside to Dallas—is this yours?
A. This carries the rates in connection with the mileage book, which is not here.

(By Mr. Meresereau:)

Q. In other words, you want the tariff showing the mileage from that point to Dallas in order to figure out the rate?
A. Yes, sir.
Q. In this tariff that provides for these diversions, I wish you would turn to the place showing that the S. A. & A. P. and
40 Katy lines are parties to it.
A. That is covered by the rule on page 51 of Texas basing tariff No. 2 A. I. C. C. 16, which provides that shipments transported under the rates, rules and regulations prescribed in this tariff, and in tariffs made subject to this tariff, shall be subject to such further charges and allowances as are contained in publications of the participating carriers lawfully on file with the Interstate Commerce Commission relating to a number of things, among which is diversion and reconsignment.
Q. Is the San Antonio and Aransas Pass and M. K. & T. of Texas and the M. K. & T. Railway Company a party to that tariff?
A. All three of them are.
Q. Now, what tariff prescribes for the diversion rule as spoken of in that tariff lawfully on file with the commission?
A. The M. K. & T. diversion tariff No. 4048 S. I. C. C., No. A. 3990.
Q. And read that, will you, that portion that gives the rule?
A. It provides on the face of it, rules under which destination of freight may be changed, diverted or held, and charges that are assessed for that service. And item No. 1 under general application says: The reconsignment or change of destination will be made only when no part of the shipment has been removed from the car or possession of the carriers. And under item 3 it provides for a re-

consigning charge of 82 except as provided in other items which remove it on fruit and vegetables.

Q. This tariff, this Leland tariff that provides a diversion can be made under the M. K. & T. tariff, all these railroad companies are parties to this Leland tariff 13 we just spoke of awhile ago,
41 aren't they?

A. Yes, the S. A. & A. P., M. K. & T. and M. K. & T. of Texas are all parties to it.

Mr. Lebrecht: Supplement No. 18 to Southwestern Lines Tariff No. 84 B, which is Supplement No. 18 to I. C. C. No. 1033, to which all the carriers, being the defendant Missouri, Kansas & Texas of Texas and the Missouri, Kansas & Texas Railway Company are parties.

I want to read item 72 B of the Supplement, appearing on page 16.

"Re-icing at intermediate stop points, at reconsigning points and at final destination. Inspection of bunkers and re-icing while cars are at intermediate points, as provided in paragraph C, or at final destination, as provided in paragraph D. Carriers will examine bunkers daily, and when such cars require additional ice they shall be re-iced to capacity. When cars are forwarded from intermediate points, as provided in paragraph C, bunkers shall be re-iced to capacity before forwarding.

Non-compliance of Instructions to Re-ice.

B. No instructions will be accepted from shippers, owners or consignees for re-icing at intermediate points or at destination of shipments subject to this tariff.

Charges for Re-icing at Intermediate Stop or Consigning Points.

C. The charge for all ice supplied at any intermediate point between the point of origin and final destination to cars which have been stopped or held on orders of or for reconsignments instructions from the shipper or consignee or for partial unloading shall
42 be added to waybill for collection at final destination.

Charges for Re-icing at Final Destination.

Paragraph D. The charge for all ice supplied after arrival of car in destination train yards without allowance for free time shall be collected from consignee in addition to all other charges as provided in this tariff."

Mr. Mersereau: I want to object to that tariff, if Your Honor please, for the reason that it is immaterial to the issues here, and does not apply to this sort of a situation, because that tariff has reference to shipments where it has not been accepted by the consignee. In this case the evidence shows that the consignees were notified and did accept the car, and it remained on the track for one, two or three

days before it was unloaded by the consignee, therefore that tariff has no reference to that situation.

The Court: Of course, that does not apply to destination.

Mr. Mersereau: It does not apply to destination where the car has been accepted, and for just that reason it does say to what it does apply.

The Court: Overruled.

To which action and ruling of the court defendant then and there at the time duly excepted.

43 Plaintiff's counsel next read in evidence the deposition of W. L. MUCKLEROY:

Q. State your name.
A. My name is W. L. Muckleroy.
Q. What is your age?
A. Twenty-seven.
Q. Where do you reside?
A. Ingleside, Texas.
Q. In what business are you engaged?
A. Farming.
Q. How long have you been engaged in that business?
A. All my life.
Q. What business were you engaged in during June, 1915?
A. I was at that time inspector for the Pioneer Truck Growers Association.
Q. I will ask you whether or not on or about June 10th, 1915, you inspected a certain shipment of tomatoes and cucumbers which was loaded in car ART 14068?
A. Yes, sir, I did.
Q. State fully what you did with reference to inspecting and examining the contents of that car?
A. The tomatoes were examined by daylight, of course, and they were taken into the car by me and from one to five and sometimes six to eight crates of each man's shipment were opened and gone through thoroughly; and not meeting the requirements were refused. The cucks were treated in like manner.
Q. What kind of a car was ART 14068?
A. It was an iced refrigerator with ice bunkers in each end with heavy padded doors and the floor was ventilated, allowing the cold air from these bunkers to pass under the fruit and between them.
Q. Was it pre-cooled?
A. It was iced in Aransas Pass, I believe, we couldn't be sure of that because some of them were iced in San Antonio.

44 Q. State whether or not the tomatoes and cucumbers were in proper condition for shipment at the time they were loaded into car ART 14068?
A. They were, that was my business.
Q. Were they or were they not loaded in a proper manner?
A. They were.
Q. State how they were loaded?

A. They were stacked in stacks with cross pieces between each and every crate to hold them apart and also give bracing to prevent sliding. In the doorway between the two doors there was an alleyway left to give ventilation.

Q. Is that a proper manner in which to load shipments of this nature?

A. It is.

Mr. Hamilton: We will waive the cross-examination.

Plaintiff's counsel read in evidence the further deposition of A. L. BRACHT, which is in words and figures as follows to-wit:

Q. Do you now recollect what was the fair and reasonable market value of the various grades of tomatoes and of cucumbers at Ingleside, Texas, on June 10th, 1915?

A. Yes, I do.

Q. What were fancy tomatoes worth?

A. From 75 to 80 cents per four basket crate.

Q. What were choice tomatoes worth?

A. From 65 to 75 cents per four basket crate.

Q. What were cucumbers worth, if sound and in good condition?

A. Twenty-five cents per crate.

Cross-examination.

By counsel for defendant, read by Mr. Hamilton:

Q. You were agent for the Pioneer Truckers Association in the spring of 1915, were you not, Mr. Bracht?

A. I was.

45 Q. How many cars were shipped from Ingleside that year by the Pioneer Truckers Association?

A. As well as I can remember there were nearly fifty cars by freight besides express.

Q. How many cars were shipped by you as an individual from Ingleside?

A. None from Ingleside, individually.

Q. How many express shipments did you make individually?

A. I made no express shipments during that season from Ingleside.

Q. From what point did you ship the tomatoes that you bought at Ingleside that season?

A. I didn't buy any from Ingleside for my own account at Ingleside that season.

Q. At what prices were cash sales made to purchasers at Ingleside on June 10th 1915?

A. This car was sold at 75 cents F. O. B. Ingleside.

Q. Did you get the money for it?

A. No, consignees would not accept on account of the cucumbers in the car.

Q. To whom was it consigned?

A. It was consigned to myself at Dallas, Texas.
Q. To whom was it sold, on the terms you mentioned?
A. It was sold to W. C. Lowery for account of Henry Sheffield Company.
Q. Where are these people?
A. Dallas, Texas, W. C. Lowery is a travelling buyers' agent.
Q. Then this was not a cash sale?
A. It was to be cash on delivery.
Q. Was that price you named F. O. B. Ingleside or delivered in Dallas?
A. This price was F. O. B. Ingleside.
Q. Who inspected the car at Dallas?
A. We do not know who inspected except the Henry Sheffield Company.
46 Q. When did you sell the car to Lowery for Sheffield?
A. On the same day it was loaded.
Q. Did he know what was in the car?
A. Yes, he was at Ingleside and inspected it.

Mr. Lebrecht: That is our case, Your Honor.

Plaintiff here rested.

Whereupon, at the close of plaintiff's evidence, defendant requested the court to give an instruction in the nature of a demurrer to the evidence, which *in* in words and figures as follows, to-wit:

"At the close of the plaintiff's evidence, the court declares *a* law to be that the plaintiff is not entitled to recover in this case."

(Refused. L.)

Which said instructions in the nature of a demurrer to the evidence was by the court refused; to which action and ruling of the court the defendant then and there at the time duly excepted and still excepts.

Defense.

Defendant, to sustain the issues upon its part, offered and introduced evidence as follows, to-wit:

C. E. HALSEY, called as a witness on the part of defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Hamilton:

Q. Will you please state your name?
A. Halsey, Charles Halsey.
47 Q. What is your present occupation, Mr. Halsey?
A. Team track foreman.
Q. For what company?
A. M. K. & T.

The balance of the testimony of this witness is not material to the issue presented in this appeal, therefore it is not reproduced in this record.

Defendant's counsel read in evidence the deposition of L. A. Orth.

Q. Please state your name, age, residence, and occupation, and your residence and occupation *in* June 11, 1915.

A. L. A. Orth; 43 years of age. I live at Yoakum, De Witt County, Texas, and am manager of the Yoakum Ice Company. On June 11th, 1915, I lived at Yoakum, De Witt County, Texas, and was manager of Yoakum Ice company.

The balance of the testimony of this witness is not material to the issues presented in the appeal, therefore it is not reproduced in this record.

Defendant's counsel read in evidence deposition of Frank Polasek.

Q. Please state your name, age, residence and occupation, and your residence and occupation on June 11, 1915.

A. Frank Polasek; 33 years; Beeville, Texas; railway cashier; same on June 11, 1915.

Q. Please state whether or not on June 11, 1915, you saw or had anything to do with a certain railway car with initials ART and numbered 14068?

A. Yes.

48 Q. Please state what you did with reference to said car, and when and where you did same?

A. I iced said car in Beeville, Texas, on June 10, 1915, on the track of the S. A. & A. P. Ry. Co.

The balance of the testimony of this witness is not material to the issues presented in this appeal therefore it is not being produced in this record.

Defendant read in evidence the deposition of E. F. O'Herin.

Q. State your name?

A. E. F. O'Herin.

Q. Where do you reside?

A. Parsons, Kansas.

Q. In what business are you engaged?

A. I am local freight agent for the Missouri, Kansas & Texas Railway at Parsons, Kansas.

The balance of the testimony of this witness not being material to the issues presented in this appeal it is not deemed necessary to print in this record.

Whereupon, at the close of all the evidence, defendant requested the court to give an instruction in the nature of a demurrer to the evidence, which is in words and figures as follows, to-wit:

"At the close of all the evidence, the court declares a law to be, the plaintiff is not entitled to recovery in this case."

(Refused. L.)

Which said instruction in the nature of a demurrer to the evidence the court refused; to which action and ruling of the court defendant then and there at the time duly excepted and still excepts.

49 Whereupon, at the request of plaintiff, and over the objections of defendant, the court instructed the jury as follows, to-wit:

Plaintiff's Instructions Given.

1.

The court instructs the jury that the defendant, San Antonio & Aransas Pass Railway Company is liable to the plaintiff for any damage to the shipment in controversy from the time same was received at Ingleside until its arrival at Kansas City, Missouri, except such damage as was caused by the inherent nature of the shipment, if any damage was caused by the inherent nature of the shipment. And if you find and believe from the evidence that the tomatoes and cucumbers in question were received by the defendant in good condition for shipment to Kansas City, Mo., and if you further find and believe from the evidence that the same arrived in Kansas City, Missouri, in a damaged condition, then the burden of proof is upon the defendant to show that the damaged condition was caused by the inherent nature of said tomatoes and cucumbers.

(Given. L.)

2.

The court instructs the jury that if you find and believe from the evidence that the plaintiff, on or about the tenth day of June, 1915, delivered to the defendant, San Antonio & Aransas Pass Railway Company at Ingleside, Texas, a shipment of cucumbers and tomatoes contained in car ART 14068 consigned to A. L. Bracht, destination Dallas, Texas, via defendant and Missouri, Kansas & Texas Railway Company, and if you further find and believe from the

50 evidence that the said car was not unloaded at Dallas, Texas, but while in Dallas, Texas, and in the possession of the Missouri, Kansas & Texas Railway Company destination was changed to Kansas City, Missouri, by the Missouri, Kansas & Texas Railway Company upon instructions of the shipper, to the Missouri, Kansas & Texas of Texas; and if you further find and believe from the evidence that at the time the said cucumbers and tomatoes were delivered to the defendant carrier at Ingleside, Texas, they were in good condition for shipment to Kansas City, Mo., and if you further find and believe from the evidence that when they arrived in Kansas City, Missouri, they were in a damaged and softened condition, then

your verdict must be for the plaintiff unless you find that said damaged condition, if any, was caused by the inherent nature of the shipment.

(Given. L.)

3.

If you find a verdict for the plaintiff you shall assess his damages at the difference, if any, between the reasonable market value of the tomatoes and cucumbers in question at Ingleside, Texas, at the time the same were shipped from Ingleside, Texas, and the reasonable market value of the same at Kansas City, Missouri, when they arrived and in the condition in which they actually did arrive, plus the freigh- charges paid, if you find they were paid, and your verdict shall not exceed the sum of $481.55. By naming this amount the court does not mean to imply that you shall find this sum or any sum for plaintiff, but merely to state the amount of damages plaintiff claims.

(Given. L.)

51 Which said instructions numbered 1, 2 and 3 and each of them, as requested by plaintiff, and over the objections of defendant, the court gave; to which action and ruling of the court in giving said instructions numbered 1, 2 and 3, and each of them, as requested by plaintiff, defendant then and there at the time duly excepted and still excepts.

At the request of defendant the court instructed the jury as follows, to-wit:

Defendant's Instructions Given.

1.

The court instructs the jury that they cannot base their verdict in this case on speculation, conjecture, or guess, and if you are unable, under the evidence, to determine the amount of damages, if any, to the vegetables shipped in this case, with reasonable certainty, then you cannot find a verdict for the plaintiff.

(Given. L.)

2.

The court instructs the jury that under the law and facts of this case, that the defendant or defendant's connecting carriers, are not required nor bound to transport the property in question by any particular train or in time for any particular market, or otherwise than with reasonable dispatch.

(Given. L.)

3.

The court instructs the jury, that in this case the burden of proof is on the plaintiff, and the plaintiff must prove his case by the preponderance of the evidence, and you are instructed that by
32 preponderance of the evidence is meant the greater weight of the credible testimony and does not refer to the number of witnesses who may testify concerning any particular fact or facts, and you are further instructed that you are the sole judges of the credibility of the testimony of the witness or witnesses.

(Given. L.)

4.

The court instructs the jury that if you find and believe from the evidence that the damages to the vegetables, if any, was due to and caused by a natural tendency, if any, of the vegetables involved in this case, that is to say qualities or propensities in the vegetables themselves giving them a tendency to spoil, then your verdict must be for the defendant.

(Given. L.)

5.

The court instructs the jury that even though you find and believe from the evidence that the vegetables in question were in good condition at the time of the delivery by the shipper to the defendant, nevertheless, the plaintiff cannot recover against this defendant unless you further find that the vegetables in question were in sufficiently good condition to carry through from the point of origin to destination under the usual and ordinary conditions that exist during such a journey.

(Given. L.)

6.

The court instructs the jury, that if you believe and find from the evidence that on or about the 17th day of June, 1915, the shipment in question was delivered to the consignee or to the agent of the shipper at Kansas City, Missouri, and that the damage to the vegetables in question, if any, was caused in *in* whole or part
33 by the failure of the agent of the shipper to promptly unload or otherwise care for the said vegetables, then and in that case your verdict must be for the defendant.

(Given. L.)

7.

The court instructs the jury that the defendant cannot be held

liable for the delay, if any, in diverting the car from Dallas, Texas, to Kansas City, Mo.

(Given. L.)

Which said instructions numbered 1, 2, 3, 4, 5, 6 and 7, the court gave, as requested by defendant.

Defendant also asked the court to instruct the jury as follows:

Defendant's Instruction Refused.

8.

The court instructs the jury that if you believe and find from the evidence that on or about the 17th day of June, 1915, the shipment in question was delivered to the consignee, or to the agent of the shipper at Kansas City, Missouri, and that the damage to the vegetables in question, if any, was caused by the failure of the agent or the shipper to promptly unload the said vegetables, then and in that case your verdict must be for the defendant.

(Refused. L.)

Which said instruction numbered 8, as requested by defendant, the court refused; to which action and ruling of the court defendant then and there at the time duly excepted and still excepts.

54 And afterwards, on the same day, to-wit, on Wednesday, December 12, 1917, the same being the 25th day of the November Term, 1917, said court, under the pleadings and the evidence introduced, the instructions given as aforesaid and the arguments of counsel for the respective parties, the jury returned the following verdict:

Verdict.

We, the jury, find the issues for the plaintiff and assess his damages at four hundred and eighty one & 85/100 Dollars ($481.85-100).

And judgment was entered accordingly.

And afterwards, to-wit, on Saturday, December 14, 1917, the same being the 27th day of the November Term, 1917, of said court, and within four days after the rendition of said verdict and judgment, defendant herein filed its motion for a new trial in this cause, which said motion for a new trial is in words and figures as follows, to-wit:

Motion for New Trial.

Now on this day comes defendant and moves the court to set aside the verdict and judgment rendered in the above entitled cause and to grant it a new trial for the following reasons, to-wit:

1. Because the verdict and judgment is against the evidence.

2. Because the verdict and judgment is against the greater weight of the evidence.

3. Because the verdict and judgment is against the law and the evidence.

4. Because the verdict is for the wrong party.

5. Because the court erred in admitting over the objections of the defendant, incompetent, irrelevant and immaterial evidence offered by the plaintiff.

6. Because the court erred in overruling the defendant's demurrer at the close of plaintiff's evidence.

7. Because the court erred in overruling the defendant's demurrer at the close of all the evidence.

8. Because the court erred in giving each and every instruction which it gave as requested by the plaintiff, said instructions being numbered 1, 2, and 3.

9. Because said verdict is excessive and not sustained by the evidence in this case.

10. Because said verdict and judgment are otherwise irregular, defective and contrary to law.

And afterwards, on the same day, to-wit, Saturday, December 14, 1917, the same being the 27th day of the November Term, 1917, of said court, and within four days after the rendition of said verdict and judgment, defendant herein filed its motion in arrest of judgment in this cause, which said motion in arrest of judgment is in words and figures as follows, to-wit:

Motion in Arrest of Judgment.

Comes now defendant in the above entitled cause and moves the court not to enter judgment on the verdict rendered in said cause but to arrest the same for the following reasons, to-wit:

1. Because on the pleadings and evidence in said cause the plaintiff is not entitled to a verdict and judgment.

2. Because the verdict and judgment in said cause is not sustained by the pleadings and evidence.

3. Because on the pleadings and evidence the verdict in said cause is excessive.

4. Because said verdict and judgment are otherwise irregular, defective and contrary to law.

And afterwards, to-wit, on Saturday, March 23, 1918, the same being the 13th day of the March Term, 1918, of said court, came the

parties hereto by attorneys, and the motion of the defendant for a new trial of this cause having heretofore been by the court taken taken up, fully heard and considered, the same was by the court overruled; to which action and ruling of the court defendant then and there at the time duly excepted and still excepts.

And afterwards, on the same day, to-wit, Saturday, March 23, 1918, the same being the 12th day of the March Term, 1918, of said court, come parties by attorneys, and defendant's motion in arrest of judgment in this cause having heretofore by the court been taken up, fully heard and considered, the same was by the court overruled; to which action and ruling of the court defendant then and there at the time duly excepted and still excepts.

And afterwards, to-wit on Saturday, April 27, 1918, the same being the 42nd day of the March Term, 1918, of said court, defendant filed affidavit and application for appeal from the judgment and
57 decision of the court in this cause to the Kansas City Court of Appeals, which is in words and figures as follows, to-wit:

Affadavit and Application for Appeal.

STATE OF MISSOURI,
County of Jackson, ss:

J. D. M. Hamilton, of lawful age, being duly sworn on his oath says that he is an attorney and an agent of and for the San Antonio & Aransas Pass Railway Company, the defendant in the above entitled cause; that he makes this affidavit for and in behalf of the said defendant; that said defendant appeals to the Kansas City Court of Appeals of Missouri from the judgment rendered in the above entitled cause in and by this court at the present term thereof in favor of plaintiff in said cause and against said defendant; that such appeal is not made for vexation or delay, but because this affiant believes that the said appellant is aggrieved by the judgment or decision of this court and this affiant for and in behalf of said appellant prays that said appeal be allowed.

J. D. M. HAMILTON.
Attorney for Appellant.

Subscribed and sworn to before me this 27th day of April, 1918.

And upon due consideration thereof the court granted and allowed said defendant an appeal in this cause to the Kansas City Court of Appeals as prayed for.

And the appeal bond to be filed in this cause was by the court fixed at the penal sum of Twelve Hundred Dollars ($1200.00). Thereupon defendant filed said appeal bond with defendant as prin-
58 cipal and the United States Fidelity & Guaranty Company as surety thereon in the sum of Twelve Hundred Dollars ($1200.00), which bond was by the court approved.

And defendant was by the court given until or before the last day of the May Term, 1918, of this court, in which to present and file its Bill of Exceptions herein.

And now comes defendant San Antonio & Aransas Pass Railway Pass Railway Company, and presents the foregoing to the Hon. O. A. Lucas, Judge of the Circuit Court of Jackson County, Missouri, and prays him to allow and sign the same as its true Bill of Exceptions to the acts and rulings of the court hereinbefore recited.

Now, therefore, the undersigned Judge of the Circuit before whom said cause was pending and said proceedings were had, being fully advised in the premises, doth find the foregoing to be a true Bill of Exceptions on behalf of said defendant San Antonio & Aransas Pass Railway Company, and doth sign and in open court doth order that the same be filed and be made a part of the record in said cause.

Given under my hand at Kansas City, Missouri, this 11th day of October, 1918.

O. A. LUCAS,
Judge of Division No. 2 of the Circuit Court of Jackson County, Missouri, at Kansas City.

The above and foregoing is a true abstract of the Record in this case.

Respectfully submitted,
LATHROP, MORROW, FOX & MOORE,
Attorneys for Appellant.

59 EXHIBIT B.

In the Kansas City Court of Appeals, October Term, 1918.

December Call.

No. 13140.

A. L. BRACHT, Respondent.

vs.

SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY, Appellant.

Respondent's Further Abstract of the Record.

Respondent wishes to present the following additional parts of the record which appear in the Bill of Exceptions:

MARTIN UNGERLEIDER, called as a witness on the part of the plaintiff, further testified as follows:

Q. Who presented this bill for payment with that notation on it?
A. Why, this bill was presented by the Kansas City Railroads, I think the Clearing House or Collection Bureau.

Q. The Railroad Collection Bureau?

A. Yes.

Q. This Collection Bureau, the railroads all employ one man to collect the freight, is that correct?

A. I believe that is the general idea of the Bureau.

Mr. Lebrecht: The plaintiff offers in evidence Exhibit 2.

60 Plaintiff's counsel read in evidence said freight bill heretofore marked by the reporter Plaintiff's Exhibit 2, as follows:

PLAINTIFF'S EXHIBIT 2.

Freight Bill Form No. 1149-K. C.

Freight Bill No. 2371.

Consignee. Kansas City, Mo., June 19 15

AUB. J.

Collect Undlndeider & Son

Destination		Via		Ry	9
To Missouri.	Kansas & Texas Railway Co.			Dr.	Via
For charges on articles	waybilled from Ingleside, Tex.			SAAP	Waco, MKT

Date W. B.	W. B. No.	Car Number & Initial	Connecting Line Reference, point of origin and full name of shipper.
6 10	SAP 52	ART 14068 Ex Car	A. L. Bracht.

Number of Packages and marks.	Articles.	Freight.	Rate.	Freight.	Advanced.	Total.
780 Crts Toms or SL Age	17940					
94 Crts Cukes or SL&C	4230					
	22170		50	110 85		
			30¾	68 17		
Orig. consg. to Gimochio Jones				179 02		

To go thru understand refgn TFK
Undergleider & Son 6-19
" Total prepaid $
In pencil: Cks. overripe & decayed when reed & held by MK&T K C
A. G. Peck

Received payment 6 22 15

Rubber stamp:
Paid Jun 22, 1915
R. P. Isitt, Mgr.
Per.....$
Kansas City Rail road Collection Bureau
Total.....179.02
.....Agent.

Stamped: Pay R. P. Isitt, Manager
Kansas City Railroad Collection Bureau
for account of M. K. & T. Railway Co.,
Missouri, Kansas & Texas Ry. Co.
By A. G. Peck, General Agent.

"For use at junction points on freight subject to connecting line settlements.

R. I. KLINE, called as a witness on the part of plaintiff, being duly sworn, testified as follows:

Q. Have you got the Texas Lines Lasing Tariff No. 2-A, before you?

A. I have, yes, sir.

Q. Turn to page 51 which provides for rules of diversion of shipments originally destined within the State of Texas?

A. Yes, sir; I have it before me.

61 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Kansas City Court of Appeals of the State of Missouri, Greeting:

Being informed that there is now pending before you a suit in which San Antonio and Aransas Pass Railway Company is appellant, and A. L. Bracht is respondent, No. 13140, which suit was removed into the said Kansas City Court of Appeals by virtue of an appeal from Jackson County Circuit Court, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Kansas City Court of Appeals and removed into the Supreme Court of the United
62 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirtieth day of October, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

63 [Endorsed:] File No. 27149. Supreme Court of the United States, No. 395, October Term, 1919. A. L. Bracht vs. San Antonio and Aransas Pass Railway Company. Writ of Certiorari.

[Stamped:] Filed Nov. 19, 1919. L. F. McCoy, Clerk.

64 In the Kansas City Court of Appeals.

No. 1314.

A. L. BRACHT, Respondant,
vs.
SAN ANTONIO & ARANSAS PASS RAILWAY COMPANY, Appellant.

Stipulation.

It is hereby stipulated and agreed by and between counsel herein that the certified transcript of the record on file with the Supreme Court of the United States shall be taken and considered as the return to the writ of cert-orari issued by the Supreme Court of the United States in this case now pending in the Supreme Court of the United States under file No. 27149, Docket No. 395 of October term 1919.

HAL R. LEBRECHT,
Attorneys for A. L. Bracht.
BOYLE, ZELL & GROVER,
Attorneys for San Antonio & Aransas Pass Railway Company.

65 STATE OF MISSOURI, *ss:*

In pursuance to the above and foregoing writ of certiorari from the Supreme Court of the United States to the Judges of this Court, in the cause wherein A. L. Bracht is Respondent, and San Antonio and Aransas Pass Railway Company is Appellant, No. 13140, I do hereby certify that the foregoing is a full true, and complete copy of the stipulation of the parties hereto, by their attorneys, that the certified transcript of the record of this Court, on file with the Supreme Court of the United States shall be taken and considered as the return of this Court to the writ of certiorari herein, heretofore issued by said Supreme Court of the United States, under file No. 27149, Docket No. 395 of the October Term, 1919, of said Court, as fully as said stipulation remains of record and on file in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court hereto, at office in Kansas City, Missouri, this 19th day of November, 1919.

[Seal Kansas City Court of Appeals.]

L. F. McCOY,
Clerk of the Kansas City Court of Appeals.

66 [Endorsed:] File No. 27149. Supreme Court U. S. October Term, 1919. Term No. 395. A. L. Bracht, Petitioner, vs. San Antonio and Aransas Pass. Writ of certiorari and return. Filed Nov. 28, 1919.

No. 10[redacted]118

IN THE

Supreme Court of the United States

A. L. BRACHT, PETITIONER,

VS.

SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY, RESPONDENT.

APPLICATION FOR WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF MISSOURI.

PETITION AND PETITIONER'S BRIEF.

I. N. WATSON,
Attorney for Petitioner.

HAL R. LEBRECHT,
L. A. LAUGHLIN,
Of Counsel.

INDEX.

Citations.

No. .....

IN THE

Supreme Court of the United States

IN THE MATTER OF THE PETITION OF A. L. BRACHT, FOR WRIT OF CERTIORARI DIRECTED TO THE KANSAS CITY COURT OF APPEALS OF MISSOURI, TO BRING BEFORE THE SUPREME COURT THE CASE OF A. L. BRACHT, PETITIONER,

VS.

SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY, RESPONDENT.

APPLICATION FOR WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF MISSOURI.

NOTICE OF APPLICATION FOR WRIT OF CERTIORARI.

The respondent is hereby notified that the petitioner will on Monday, the 16th day of June, 1919, upon its verified petition and a copy of the entire record in this cause, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a

copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you, to the Supreme Court of the United States, in its court room at the capitol, in the City of Washington, D. C.

.....

.....
Attorney for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition for writ of certiorari and brief in support of the petition are hereby acknowledged.

.....

.....
Attorneys for Respondent.

In the Supreme Court of the United States. In the Matter of the Petition of A. L. Bracht, for writ of certiorari directed to the Kansas City Court of Appeals, of Missouri, to bring before the Supreme Court the case of A. L. Bracht, Petitioner, v. San Antonio and Aransas Pass Railway Company, Respondent.

Comes now A. L. Bracht by I. N. Watson, his attorney, and moves the honorable court that it shall by certiorari or other proper process directed to the honorable, the judges of the Kansas City Court of Appeals of the State of Missouri, require said court to certify to this court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the respondent, San Antonio and Aransas Pass Railway Company was appellant, and your petitioner, A. L. Bracht was appellee, and to that end it now tenders herewith its petition and brief with a certified copy of the entire record in said cause in said Court of Appeals.

.....

.....

Attorney for Petitioner.

To the Supreme Court of the United States. The Petition of A. L. Bracht for Writ of Certiorari Directed to the Kansas City Court of Appeals of the State of Missouri, to bring before the Supreme Court the case of A. L. Bracht, Petitioner, against San Antonio & Aransas Pass Railway Company, a corporation, Respondent.

Petition For Certiorari.

Said petitioner respectfully shows to this Honorable Court as follows:

I.

Your petitioner states that the respondent is and was at all times herein mentioned a railroad corporation organized under the law and engaged in operating a line of railroad in the State of Texas as a common carrier for hire in inter-state commerce. That on about June 10th, 1915, petitioner delivered to respondent at Ingleside, Texas, a carload of tomatoes and cucumbers for transportation, said car being consigned to your petitioner at Dallas, Texas. At the time of shipment respondent issued its straight bill of lading wherein petitioner was named as consignee and the destination of said shipment Dallas, Texas.

That upon the date of the arrival of the car at Dallas, Texas, petitioner requested the Missouri, Kansas & Texas Railway Company of Texas, which had transported the car into Dallas, from its connection with the respondent, to divert the car to Kansas City, Missouri, which order for diversion was accepted and said car transported on to Kansas City, Missouri. There was no delivery of the car at Dallas, nor inspection made, but the car upon the same day it arrived at Dallas was di-

verted by the shipper to Kansas City, Missouri; Car from shipping point was transported by the respondent and the Missouri, Kansas & Texas Railway Company of Texas to Dallas, Texas; from Dallas the car was transported to Kansas City, Missouri, by the Missouri, Kansas & Texas Railway Company of Texas, and the Missouri, Kansas & Texas Railway Company.

Under the tariffs of the respondent and both connecting carriers lawfully on file with the Inter-State Commerce Commission, to which tariffs all carriers were parties, the shipper was allowed to divert the shipment to a new destination on the through freight rate from point of origin to the substituted destination. The carriers charged the through freight rate on the car in controversy from point of origin to the substituted destination. The tariff of respondent and the connecting lines involved herein, provided for diversion of shipments even though originally destined within the State of Texas, which provided that shipments transported under the rates, rules and regulations provided in the tariff should be subject to such further charges and allowances as are contained in publications lawfully on file with the Inter-State Commerce Commission relating to diversion and reconsignment.

II.

The car of produce arrived in Kansas City with its contents severely damaged and to recover said damages your petitioner brought suit in the state court of Jackson County, Missouri, against respondent as initial carrier under the Carmack Amendment to the Inter-State Com-

merce Act. That said suit of the petitioner was brought directly upon the theory that the respondent was the initial carrier under the Carmack Amendment and liable to petitioner for the damages the shipment sustained, whether the damage was sustained on the lines of respondent or that of its connecting carriers. That upon the trial of said cause in the Circuit Court of Jackson County, Missouri, at Kansas City, there was no evidence offered that the shipment was damaged upon its arrival at Dallas, Texas, and your petitioner especially claimed at said trial that the liability of respondent was based solely on the ground that the shipment was one inter-state shipment from Ingleside, Texas, the point of shipment, to the substituted destination, Kansas City, Missouri; that this was only one shipment; that the tariff provisions allowed the public and carriers to extend the shipment and modify the contract of shipment to a substituted destination; and that respondent is liable as the initial carrier by virtue of the Act of Congress known as the Carmack Amendment to the Inter-State Commerce Act approved June 29th, 1906.

III.

That the trial in said Circuit Court resulted in a judgment in favor of your petitioner and against the respondent in the sum of $481.85 from which judgment respondent appealed to the Kansas City Court of Appeals.

IV.

That upon the hearing of said appeal said Kansas City Court of Appeals on February 17, 1919, rendered

an opinion in which said court, notwithstanding the foregoing facts, decided against the title, right, privilege and immunity thus specially set up and claimed by your petitioner by virtue of such statute, and held that said shipment was intrastate and that said Carmack Amendment did not apply and hence that respondent was not liable and the judgment should be reversed, but that if said shipment was an interstate shipment that respondent would be liable and the judgment should be affirmed.

V.

That within the time allowed by the rules and practice of said Kansas City Court of Appeals your petitioner filed motions for rehearing of said cause and to transfer the same to the Supreme Court of Missouri, which motions were on the 12th day of March, 1919, overruled by said Court of Appeals and final judgment was entered therein reversing the judgment of the Circuit Court of Jackson County, Missouri.

VI.

That on March 31st, 1919, your petitioner applied to the Supreme Court of Missouri for a writ of certiorari to have the record and proceedings in said cause certified to said Supreme Court on the ground that such decision was in conflict with a prior decision of said Supreme Court, that being the only ground under the construction and laws of Missouri upon which a review of such judgment would be heard by the Supreme Court of Missouri, but said application was denied by said Supreme Court.

Your petitioner presents herewith as part of this petition an entire transcript of the record of the case, including the proceedings in said Kansas City Court of Appeals.

Your petitioner believes that said judgment and decision and interpretation of said Act of Congress made by said Kansas City Court of Appeals were and are erroneous and that the public interest and the interests of jurisprudence require that the question of law involved should be decided by this Honorable Court and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in said cases made and provided.

That many thousands of cars of perishable fruits and vegetables are moved yearly from the Southern and Pacific States to the Northern markets and such cars are usually started toward the market as soon as loaded, consigned to the shipper at some point within the state of origin, and then being sold in transit the destination is changed by the shipper to a point outside the state and the through rate is assessed from point of origin to the point of final destination. Whether such shipments shall be classed as intrastate or interstate becomes a question of great practical importance to the commercial interests of the country.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court directed to the Kansas City Court of Appeals of the State of Missouri commanding the said

court to certify and send to this court a complete transcript of the records and proceedings of said Kansas City Court of Appeals in the said case therein entitled A. L. Bracht vs. San Antonio & Aransas Pass Railway Company No. 13140 to the end that same may be reviewed and determined by this court as provided by the Acts of Congress in that your petitioner may have such other and further relief as to this court may seem proper in conformity with the said acts, and that the said judgment of the Kansas City Court of Appeals and every part thereof may be reversed by this Honorable Court, and that said judgment of the Circuit Court of Jackson County, Missouri, and every part thereof may be affirmed and reinstated by this Honorable Court.

Your petitioner will ever pray.

A. L. BRACHT, *Petitioner,*

By .....

His Attorney.

State of Missouri, County of Jackson, ss.

I. N. Watson, being duly sworn, said that he is attorney for A. L. Bracht, the petitioner. That he prepared the foregoing petition and that the allegations therein are true as he verily believes.

.....

.....

Subscribed and sworn to before me this .... day of May, 1919.

My commission expires .....

.....

Notary Public.

In the Supreme Court of the United States of America. The petition of A. L. Bracht for writ of certiorari Directed to the Kansas City Court of Appeals, to bring before the Supreme Court the case of A. L. Bracht, Petitioner, vs. San Antonio & Aransas Pass Railway Company, a corporation, Respondent.

BRIEF OF PETITIONER.

I.

The petitioner asks this Honorable Court to grant him a writ of certiorari to the Kansas City Court of Appeals, of Missouri, for the reason that the judgment and decision of said court in the above cause denies petitioner his right, title and privilege under the statute and authority of the United States, under the Act of Congress approved Sept. 6th, 1916, being an act to amend the Judicial Code. (U. S. Annotated Statutes 1916, Vol. 2, Par. 1214.)

Petitioner brought this suit in the state court bottomed specifically upon the Carmack Amendment to the Interstate Commerce Act claiming that the transportation of the shipment from point of origin to the substituted destination was only one interstate shipment, hence the respondent was liable under the Carmack Amendment. The Kansas City Court of Appeals in rendering their judgment against the petitioner decided that there were two shipments, one an intrastate shipment from point of origin to the first destination, the other a shipment from the first destination to the substituted destination to which the car was diverted. If petitioner is correct in his contention the Kansas City Court

of Appeals denied petitioner his right guaranteed under the Federal Constitution, and especially his right and privilege under the Federal Act known as the Carmack Amendment to the Interstate Commerce Act.

Under this situation the Supreme Court has clearly jurisdiction by certiorari, as appears in *C. G. W. Ry.* v. *Basham*, decided by the Supreme Court March 3rd, 1919, and reported in the advance sheets or 39 Supreme Court Reporter, page 213.

Prior to the Act of September 6, 1916, this case would have been properly brought before this court by writ of error, as was the case of *N. Y. C. & Hudson River R. R. Co.* v. *Beaham*, 242 U. S. 148, 37 Supreme Court Reporter, page 43. This case was brought before this court by writ of error to the Kansas City Court of Appeals of the State of Missouri wherein the Missouri court affirmed a judgment against a carrier for the full value of lost baggage, notwithstanding a limitation of such liability published in the carriers' tariffs. The decision of the Court of Appeals in the Beaham case denied the carrier its federal right, while in the case at bar the Court of Apepals denied the federal right of the petitioner.

In *St. L. I. M. & S. Ry. Co.* v. *Starbird*, 243 U. S. 592, 37 Supreme Court Reporter 462, Mr. Justice Day clearly defines the right of review by this court where petitioner's federal right is denied. As petitioner's right and cause of action and petition were bottomed on the Carmack Amendment, under the authorities petitioner is entitled to have this cause reviewed by this court.

II.

As shown by the record and the petition of petitioner the Supreme Court of Missouri was asked to review this case and the decision of the Court of Appeals, but refused to do so. This left the judgment one rendered by the highest court of the State of Missouri in which a decision could be had. The record shows petition for certiorari was denied by the Supreme Court of Missouri. This was the only method by which the matter could be heard by the Supreme Court of Missouri.

As said in *State ex rel Schmohl* v. *Ellison et al.*, Judges 182 S. W. page 740, 266, Mo. Supreme Court Reports, page 580:

> "It will be observed from the statement of this case that there can be but two possible questions. First, whether the Court of Appeals was wrong in holding that the two contracts must be considered as one, and, second, if right in this construction whether or not their views upon the merits of the case is diverse from the views previously expressed by this court."

The Supreme Court of Missouri in *Mitchell* v. *Joplin National Bank* (decided March, 1918, 201 S. W. Reporter page 903), held that the fact that the matter involved was determinable by the Supreme Court of the United States was not determinative of the jurisdiction of the State Supreme Court. Also that where the Federal Statutes under which recovery was sought were not alleged to be invalid, the Court of Appeals of the state had jurisdiction, as the Constitution of the State of Mis-

souri vests jurisdiction in the Supreme Court of the state in cases where the validity of the Federal Statute is involved so that the Court of Appeals is the highest court in which a decision could have been had, although the judgment deprives a party of a right or immunity claimed under the statutes of the United States.

Again Mr. Justice White in *Mo., Kan. & Tex. Ry. Co.* v. *Elliott,* 184 U. S. 530, *22* Supreme Court Reporter, page 446, states:

> (Syllabus) "The Kansas City Court of Appeals is the court to which a writ of error will be issued by the Supreme Court of the United States to review a federal question decided by it, when the Supreme Court of the state has decided that it cannot review the decision."

As was said by the Supreme Court of Missouri in *State ex rel Wabash Ry. Co.* v. *Ellison et al., Judges,* 204 S. W. page 396, decided in June, 1918:

> "In certiorari to review decision of Court of Appeals on ground that it conflicts with decision of Supreme Court, it is immaterial what the Supreme Court thinks of the question as an original proposition and the judgment can be quashed only when there is a conflict."

The Supreme Court of the State of Missouri evidently refused certiorari to petitioner for the reason that the ruling of the Court of Appeals was not in conflict with the Supreme Court's prior rulings.

Whether or not the diversion of a shipment, first made or billed as an intrastate shipment, creates a new

shipment or merely extends the original shipment is one of national importance to the shippers and railroads of the United States. As was said in the *Croninger* v. *Express Co.* case, there must be a uniform liability with reference to the common carriers. For the convenience and practicability of marketing most perishable products, such as fruits and vegetables, shipments are made to a diverting point within the state of the shipments' origin, and then diverted, on the through rate in effect, from point of origin to substituted destination. The tariffs of the carriers throughout the country, which are on file with the Interstate Commerce Commission, permit and allow diversions. The Interstate Commerce Commission holds clearly that a shipment so transported is only one shipment, and that the through rate must be collected by the carriers, even though it would be more than the intrastate rate to first destination plus the freight rate from the first destination to the substituted destination. The carriers throughout the country exact their charges accordingly. Some of the states hold that the transportation of a shipment such as the one under consideration is a through shipment, others hold otherwise. The Federal Courts have not been clear in their decisions so that in addition to petitioner's right to have this matter adjudicated by this court it is most important to the shippers throughout the United States to have the matter clearly and finally decided by the Supreme Court of the land. This for the further reason that the law should be uniform in this matter so that there will be no unjust discriminations.

II.

In *B. & O. R. R. Co.* v. *Montgomery* (State of Georgia), 90 S. E. page 740, the court holds that a diversion modifies or extends the contract of shipment as originally made and that the transportation of a diverted shipment from the point of origin to the substituted destination is one shipment. In that case, the shipper delivered to the B. & O. a carload of peaches and the railroad issued its bill of lading wherein the car was destined to Richmond, Va. After the car arrived at Richmond, Va., the consignee diverted the shipment to Atlanta, Ga. The court held that the transportation from point of origin to the substituted destination was only one shipment and that the first carrier was the initial carrier and liable as such under the Carmack Amendment. The court said:

> "In interstate shipments the consignee is the presumptive owner and has a right to direct a change in the destination of the shipment. When the defendant, the initial carrier, issued the bill of lading in which Montgomery & Co. were named AS CONSIGNEES, it was with the knowledge that the law gave this CONSIGNEE the right to change the destination, and with the knowledge that the law put upon it (the initial carrier) the burden of paying for damage to the shipment if any was sustained whether the damage was caused by the defendant or a connecting carrier. The destination was changed from Richmond to Atlanta by the consignees.
>
> The shipment was carried from point of origin —Moorefield, W. Va., to Atlanta, Ga., under one contract, the bill of lading issued by the defendant

Company and the shipment MOVED UNDER THE Through RATE OF FREIGHT from point of origin to Atlanta, the final destination AS APPEARS FROM THE FREIGHT BILL. If the defendant, or its connections, had delivered the shipment at Richmond, demanded a surrender of its bill of lading, there collected the freight charges due it and thereafter issued a new bill of lading for the shipment from Richmond to Atlanta then there would have been a new shipment and the railroad issuing this second bill of lading at Richmond would have been the initial carrier of this shipment from Richmond to Atlanta.

Under the evidence advanced the only contract made was by the defendant company as represented by its bill of lading, the freight was paid at Atlanta for the transportation not merely from Richmond to Atlanta but for the entire journey from Moorefield to Atlanta.

Under the facts of the instant case the defendant railroad company was the initial carrier of the shipment involved."

The courts of Illinois in *Trott* v. *B. & O. R. R.*, 192 Ill. Appeals, page 239, and *Ruddell* v. *B. & O. R. R.*, 178 Ill. Appeals, 456, hold likewise that diversion only extends or modifies the contract of shipment, but does not make the transportation two shipments.

It cannot be argued but that the tariffs of the carriers are a part of the contract of shipment, and that the bill of lading is not the contract alone. In legal contemplation the destination named on a bill of lading means that the carrier receives the property for transportation to the destination so named, or to any other destination provided for by diversion privileges in the

tariffs of the bill of lading or initial line. The diversion privileges contained in the tariffs are in a sense options by which the carriers agree to extend the shipments, or modify the contract of shipment, according to the tariff provisions. Of course the contract of shipment could not be extended indiscriminately or indefinitely, but only in strict accordance with the tariff rules and tariff privileges contained in the tariffs.

The character of the commerce and not its mere accidents of billing determine whether or not the transportation is interstate in character or not.

The Supreme Court in *Railroad Commissioners* v. *Worthington*, 225 U. S. 101, 32 Supreme Court Reporter, 653, states as follows:

> "It makes no difference that shipments of products were not named on through bill of lading and that the basis of through billing was not necessarily determinative."

In *Railroads Commissioners of Texas* v. *Texas & Pacific*, 229 U. S. 336, it is said:

> "Shipments of freight under local bill of lading calling for transportation from another point in Louisiana to New Orleans, La., there to be delivered to the shippers or consignees, or intended by the shippers to be exported and treated accordingly by both shippers and carriers constitutes foreign commerce, and as such is governed as to the intrastate transportation by the tariffs on file with the Interstate Commerce Commission."

In the case at bar the opinion of the Court of Appeals makes the intention of the shipper at the time the

car was delivered to the defendant railroad determinative of the question whether it was an interstate shipment or an intrastate shipment. In other words, if we understand the opinion correctly, if the plaintiff had testified at the trial that it was his intention at the time the car was delivered to the defendant railroad to divert it in transit to a point outside of Texas, then it would have been an inter-state shipment, but in the absence of such intention the destination named in the bill of lading was controlling. This intention need not be communicated to the railroad company, and thus we have so important a question as to whether a shipment is interstate or intrastate, depend upon the mental process of the shipper, which he alone knows anything about. He testified the car was to be sold in transit. Of course at the time of shipment the shipper truthfully did not know where he would market the car.

This doctrine has been expressly repudiated by the Supreme Court of the United States in *G. C. & S. F. Ry. Co.* v. *Texas*, 204 U. S. 403, where the court said:

> "In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made to know whether it was bound to obey the state or Federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract."

If the court means that the intention of the parties must be learned from the contract of shipment, then it is

important to know just what that contract was. That contract provided for a shipment from Ingleside, Texas, to Dallas, but the tariff rule, which is a part of the contract of shipment, provided that the car might be diverted within forty-eight hours after arriving at its first destination, in which case a through rate would be given from point of origin to final destination. The car was diverted by the shipper within forty-eight hours after it arrived at Dallas, and the through rate was given. The car was not delivered to the plaintiff at Dallas. It remained all the time in the possession of the carrier, and at no time from the time the car left Ingleside until it arrived at Kansas City did the plaintiff have actual or constructive possession of it. The possession of the carrier during all this time was not because of any refusal on the part of the consignee to accept delivery, but was strictly in accordance with the contract of shipment. The Federal Courts hold that unless the shipment has been delivered to the consignee, is physically present and in the possession of the shipper at the time of the reBilling, the second shipment is a continuation of the first and is not a new contract of shipment.

C. M. & St. P. Ry. Co. v. *Iowa*, 233 U. S. 334
G. C. & S. F. Ry. Co. v. *Texas*, 204 U. S. 403.
A. T. & S. F. Ry. Co. v. *Harold*, 241 U. S. 371.

In the foregoing cases the question whether the reBilling was a second contract of shipment or a continuation of the first, depended upon whether there had been a delivery under the first contract of shipment, in other words, whether the first contract of shipment had been completed.

In *U. S.* v. *Phil. & R. Ry. Co.*, 232 F. R. 949, Judge Thompson of the United States District Court for the Eastern District of Pennsylvania said:

> "If, for instance, a shipment were made over the defendant's railroad from the coal regions in Pennsylvania to a point in New Jersey to a certain consignee, and that consignee, *after delivery* re shipped from the point in New Jersey to another point in New Jersey under a new consignment to a different consignee, the inter-state through rate from the coal regions in Pennsylvania to the second point in New Jersey would not apply, but the interstate rate would apply from the first to the second point in New Jersey."

This same question recently came before the United States Circuit Court of Appeals for the Sixth Circuit in *Settle* v. *Baltimore & O. S. W. R. Co.*, 249 F. R. 913. In that case the question arose whether cars of lumber purchased by plaintiff in error at various southern points and billed to Oakley, Ohio, and then re-billed to Madisonville, Ohio, were inter-state shipments between Oakley and Madisonville. All the Federal authorities on this question are reviewed in the opinion and the court said:

> "While the question is not free from difficulty, upon a careful consideration of the authorities we are disposed to think that the character of the shipment from Oakley to Madisonville is to be ultimately tested by the consideration whether or not there was an actual good faith delivery of the shipment to the consignees at Oakley, and actually a new and independent shipment therefrom by defendants to Madisonville, while the lumber was physically present and in their possession, and that the effect of such good faith delivery, possession

> and independent re-shipment is not as a mere matter of law, converted into an inter-state shipment by the existence of an original continuing intention to so reship in intrastate commerce for the saving of expense."

Suppose that plaintiff had sold this car to a man in Dallas f. o. b. destination before the car left Ingleside, and in the contract of sale had provided that the purchaser could have the option to change the point of delivery within forty-eight hours after arrival of the car at Dallas, that the purchaser exercised his option within that time and directed delivery to be made at Kansas City, would not this change in the place of performance of the contract be in accordance with the contract so that the laws of Missouri would govern the performance?

The question involved in the case at bar is one of great importance to shippers. Perishable products such as oranges from California and Florida and early vegetables from the south are started on their journey to markets without being sold, and hence are consigned to the shipper at some point within the state where the shipment originated. By so doing the commodity can be sold in transit and a saving in time made in getting it to the market. Whether such a shipment is inter-state or intrastate is one of practical importance not only on account of the rate, but also on account of loss or damage to the shipment.

The car nor any portion of it was unloaded at Dallas; the car was diverted on the same day the car arrived at Dallas.

Furthermore the carriers collected the through interstate rate of freight, which is the interstate rate from Ingleside to Kansas City, Missouri. Further the respondent and both of the connecting carriers had on file with the Interstate Commerce Commission tariffs allowing diversion privileges such as petitioner requested and received.

Respondent contends that the issuance of the original bill of lading by the S. A. & A. P. consigning the car to Dallas, and the subsequent issuance of an *exchange* bill of lading by the M. K. & T. of Texas at Dallas was evidence of there being two shipments, as there were two contracts. As the court well knows the question of contracts between carriers and shipper is a thing of the past. The law does not allow the matter as to the legal liability of shipments to be contracted about. The law superimposes the contract upon both carrier and shipper, and there is no latitude left for either. Of course on some shipments the shipper has the choise of rates based upon the valuation of the shipment, but even then when the shipper makes the choice of rate the law imposes the contract. Furthermore strictly there was no bill of lading issued at Dallas, Texas. The shipment arrived in Kansas City June 17th. The M. K. & T. bill of lading was dated June 24th, at Houston, Texas. So the shipment had arrived at destination before even this bill of lading was issued. It also states the shipment was received at Houston, Texas, which is certainly an error.

However, the bill of lading issued by the M. K. & T. bore the notation "Issued in lieu of SA&AP Ingleside,

Texas, bill of lading M-60 dated June 10th bearing Internal Revenue Stamp." It will be noted there was no revenue stamp placed upon the M. K. & T. B/L which would have necessarily been done had the parties construed the bill of lading to be a new contract or a new shipment. The issuance by the M. K. & T. of this bill of lading was only to show the new destination of the shipment, as it states on its face it was issued in lieu of the S. A. & A. P. bill of lading. It was issued only as a matter of evidence. The petitioner confirmed the evidence of his right to divert the shipment by mailing his SA&AP bill of lading in compliance with the telegram. Of course the carrier would not want an outstanding bill of lading on a shipment reading destination Dallas when the consignee of the shipment ordered it diverted to a new destination. And when petitioner surrendered his original bill of lading he was entitled to the evidence showing that he billed the car originally from Ingleside, SA&AP, but that the carriers at his request had diverted the shipment to a new destination. Hence the courtesy of the M. K. & T. Ry. some time later mailing petitioner the exchange bill of lading.

In the case of *Keithly and Quinn* v. *Lusk*, 195 Missouri Appeal, 143, the court says:

> "We may also here remark that the law and courts, both State and Federal, favor the making and interpretation of the contracts for shipments over connecting carriers as being for through shipment and making the initial carrier with whom the contract is made liable for all damages whether caused by such initial carrier or connecting carrier.

This is rightly so, as illustrated by the present case, since it is almost impossible for the shipper, who parts with his property in good condition and, having no control over or knowledge of it during transit, finds it damaged when delivered to him at the end of a long journey, to ascertain the exact time and place of the injury or by which carrier inflicted. * * * **We are aware, however, in speaking of a contract between shipper and carrier, that there is little, if any, freedom of contract in such cases, and that whatever contract there is must be general and alike to all shippers, and is in fact superimposed on carrier and shipper alike by the law and rules and regulations prescribed thereunder from which neither carrier nor shipper is allowed to depart.** * * * Yet the manner of billing a shipment is not conclusive as to the character of such shipment, whether a through one or not. A review of the authorities convinces us of the correctness of that conclusion, and that the whole evidence justifies a finding that this was a through shipment by defendant, notwithstanding the bill of lading was only to Jonesboro and its tariffs provided for reconsignment on proper request of any shipper. It seems that the real test is whether the parties intended that there should be a continuity of movement of the freight from one place to another—a continuous or single shipment not ending until the goods arrived at the place of destination; that the initial carrier undertakes to have the goods forwarded to destination without the shipper having to make any new or intervening contract with the connecting carrier."

The respondent ignores its tariffs. Petitioner in presenting this case is necessarily bound by the tariffs and so is respondent, and it is useless to cite authority that the tariff provisions are binding on both parties.

If the respondent did not cause the damage to the shipment, but the M. K. & T. caused the damage, then the respondent has the right, under the law, to recover the amount in this suit from the M. K. & T.

See paragraph 8604-AA, page 9311, U. S. Compiled Statutes Annotated, 1916, Vol. 8.

Under respondent's tariff, I. C. C. No. 16 at page 51, it was provided that shipments transported under it destined to points within the State of Texas, shall be subject to diversions as are contained in tariffs on file with the Interstate Commerce Commission. Petitioner introduced the above tariff along with others which provide for the diversion of the shipment in controversy on basis of through rate and the respondent and all carriers involved were parties to these tariffs.

Updike Grain Co. v. *C. St. P. M. & O. Ry. Co.*, 38 I. C. C., page 616, involved shipments that moved to Council Bluffs; two of the cars were diverted to Lincoln, Nebraska, and one to Kansas City. The rates charged by the carriers to Council Bluffs were local intrastate rates. The Commission held that the intrastate rate did not apply and that these shipments originated in Iowa and were transported to Council Bluffs under a bill of lading, at which point they were diverted to Lincoln and Kansas City, Missouri. The Commission held state rates did not apply for that portion of the transportation from point of origin to Council Bluffs.

In *Alabama G. S. R. Co.* v. *McFadden Bros.*, 232 Federal, page 1000, decided in 1916, it was held:

> "Where cotton was shipped to a point within the state, where the shipments originated, and there compressed, and from thence being carried from said points to without the state, the shipments to the point where the cotton was compressed would not be intrastate shipments, there being no change of ownership, but were part of an interstate shipment and the interstate rate should be charged; the mere fact that the cotton was not always billed to its ultimate destination until after compression not affecting the matter."

The last above case was affirmed by the United States Court of Appeals in April, 1917, and reported at 241 Federal, page 562. In this case it was said by the Court of Appeals:

> "Whether commerce is interstate or intrastate must be determined by its essential character and not by mere *billings or forms of contract.*"

In *M. K. & T. R. R. Co.* v. *Ward*, 37 Supreme Court Reporter, 618, decided 1917, Justice Brandeis says:

> "The purpose of the Carmack Amendment has been previously considered by this court. It was to create in the initial carrier unity of responsibility for the transportation to *destination.*"

In the matter of rates, *et cetera*, decided by the Interstate Commerce Commission July 7th, 1915, reported in 36 I. C. C., page 1, l. c. page 8, the Commission says:

> "It is well settled that the character and nature of the movement of the traffic, that is, whether the movement is a through or local movement and not the mere accidents of billing, determine the nature

of the commerce and the rate applicable. *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498; *Ohio R. R. Commission* v. *Worthington*, 225 U. S. 101; *T. & N. O.* v. *Sabin. Tram. Co.*, 227 U. S. 111; *Baer Bros.* v. *D. & R. G. R. R.* 233 U. S. 479, *R. R. Commission of La.* v. *T. & P. Ry.*, 229 U. S. 336; *Ill. Cent. R. R. Co.* v. *La. R. R. Commission*, 236 U. S. 157; *Kanotex Refining Co.* v. *A. T. & S. F. Ry. Co.*, 34 I. C. C. 271."

In the case of *Kanotex Refining Company* v. *A. T. & S. F. Ry. Co.*, decided June 8th, 1915, 34 I. C. C. page 271, the Refining Company from its refinery at Caney, Kansas, shipped various cars of petroleum to Kiowa, Kansas; it had an employe at Kiowa rebill the cars to Woodward, Oklahoma. The plaintiff's employe at Kiowa would pay the freight charges on the cars from Caney to Kiowa, Kansas, thereby paying the intrastate rate to Kiowa, Kansas, and only paying the interstate rate from Kiowa to Woodward, Okla. The Santa Fe Railway Company presented a great number of under charge bills against the Refining Company claiming that the freight charges should be the through interstate rate from the refinery at Caney, Kansas, to Woodward, Oklahoma, which is much larger than the freight as paid by the refinery, or the state rate from Caney to Kiowa plus the interstate rate from Kiowa to Woodward.

The Commission held that the through interstate rate was the proper rate to charge and that the movement to Woodward, Okla., was only one shipment, and further stated at page 276:

> "This Commission, as hereinbefore stated, has steadfastly adhered to the proposition that on any through carriage of traffic between interstate points the lawfully published interstate rate must be applied by the carrier and paid by the shipper, and that where the through interstate rate in effect between two points is higher than the aggregate of the intermediate rates any plan of first billing to an intermediate point a shipment that is really intended to reach a destination beyond is simply a device for defeating the lawful through rate, and is unlawful."

In the late case of *Memphis Merchants Exchange* v. *I. C. R. R. Co. et al.*, 43 I. C. C. reports 378, l. c. 389, the Commission said (and we think the following is absolutely controlling in the case at bar):

> "The question as to whether a shipment is inter or intra state must be determined by the essential character of the commerce, which is governed by the intent of the parties controlling the movement of the traffic; and this must be ascertained from all of the pertinent facts, circumstances, and conditions, and 'not by mere billing or forms of contract.' *C. M. & St. P. Ry. Co.* v. *Iowa*, 233 U. S. 334. It must be apparent, however, that in the case of traffic moving under transit tariffs providing for proportional or reshipping rates and other facilities or arrangements dependent in their applicability upon a prior or subsequent movement to or from the transit point, the intent of the parties must be measured not merely by the intent of one of the parties **at the time and place of shipment, but we must look to the fully ripened and completed intent as expressed and executed by the party controlling the movement of the traffic,** whether it be the original consignor or consignee or the owner, who may be neither the original con-

signor or consignee. The true and controlling intent which determines the essential character of the commerce is not fully matured and fixed until the party who, having the right to do so, decides, under the options lawfully available to him under the transit tariffs, what is to be the final destination of the shipment.

In other words, the intent which is conclusive in determining the character of the completed transportation **is not fully expressed or indicated until it is decided whether the shipment will be disposed of locally or the transit tariff provisions availed of for a further movement, treating the whole as a continuous shipment at the lawful through charge, however made up**; that is, whether at available combinations or joint through rates. Neither the billing of the traffic originally to Cairo nor the registry there for transit is conclusive of the intent which finally determines whether it is a state or interstate shipment. That completed and conclusive intent is not expressed, and may not exist, until it is finally determined under the transit tariffs, by whoever controls the movement at the time, whether or not it is to be beyond the limits of the initial state movement.

Manifestly the shipper, consignee, or owner of a shipment can not treat the different stages or steps of the completed movement of the traffic as a single unit for some purposes and as separable or local movements, in part, for other purposes. The essential character of the commerce must be consistently either state or interstate."

In *Hudson* v. *Chicago, St. P. M. & O. Ry. Co.*, 226 Federal Reporter, 38 l. c. 43, the court says:

"If the Carmack Amendment does not compel the intermediate carrier to issue a bill of lading, then the obligation cannot be assumed by the inter-

> mediate carrier by the issuance of a bill of lading; for that would be allowing the intermediate carrier to give at its option special privileges to a shipper, without having these special privileges set out in its tariff on file, and that would be a violation of the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584). So it seems to me that neither in the absence of a bill of lading, nor by issuing a bill of lading, can the intermediate carrier be held liable for loss or damage occurring on the line of the succeeding carrier."

Hence under this last above if petitioner sued the M. K. & T. as initial carrier, it could successfully defend on the theory it was an intermediate carrier.

In *Cutting* v. *Florida Ry. & Navigation Co.*, 46 Fed. page 641, the court holds:

> "Orange growers in Florida ship their fruit from one point in that state to another point in the same state, consigned to their agent at the latter point, for reconsignment, he immediately forwards them to their destination in another state; held, that the shipment from the growers to the forwarding agent was interstate commerce, not subject to the control of the Florida Railway Commission."

In other words, when the respondent received this car for transportation, billed to Dallas, Texas, in law it legally received this car for transportation to Dallas, Texas, or any other point of destination allowed and provided for by the tariffs of the respondent. The tariffs of the respondent and the connecting carriers must be construed and read in connection with the original bill of lading, as the court knows the bill of lading is a

part of the tariff and the rules and practices of the respondent, such as diversions, are also a matter of tariffs.

In *A. T. & S. F. Ry. Co.* v. *Harold*, 241 U. S. 371, 36 Sup. Ct. Rep. 665, Bell and Son sold a car of corn to Fisher Grain Co., of Kansas City, Mo., and shipped the same via Union Pacific from Yanka, Nebraska, to Topeka, Kansas. A draft with bill of lading was mailed to Fisher at Kansas City. Fisher surrendered the Union Pacific lading issued at Yanka, Nebraska, to the Santa Fe at Kansas City, and took in exchange a Santa Fe bill of lading diverting the car to Elk Falls, Kansas, a point on the Santa Fe.

The point involved in the case was whether the local law of Kansas governed the liability of the Santa Fe, in a suit for damages, brought by the purchaser of Fisher, for loss and delay, or the Federal law. This depended upon whether the movement of the car from Topeka, its first destination, was a part of the interstate shipment from Yanka, Nebraska, to Elk Falls, Kansas, or was an intrastate shipment from Topeka to Elk Falls.

The court held that the whole movement was one interstate shipment.

Suppose plaintiff had not paid the freight charges on this shipment. Would the correct charges, in view of the right of the diversion tariffs, be two local rates, the intrastate rate to Dallas, plus the interstate rate from Dallas to Kansas City? The Interstate Commerce Commission certainly has consistently frowned upon such evasions. If such was the law, all through interstate rates which are higher than the aggregate of local rates, could be

avoided by the shipper by billing originally intrastate and then diverting. The law cannot be that *for* the assessment of freight charges, the through movement is only one shipment, but on the other hand, when it is up to a shipper to maintain suit *for* damages to his shipment, the movement is two shipments.

The Texas Line-basing Tariff 2-A applies to shipments originally destined to points within Texas (Mr. Kline's testimony, Respondent's Additional Abstract). This tariff also carried the mileage basis of rates on an intrastate shipment from Ingleside to Dallas (Abstract, page 20). The interstate joint through-rate collected by these carriers was fifty cents per hundred (Abstract, p. 20).

The question at issue is *not* a matter of the Texas state tariffs. The State of Texas could *not* limit *or* deprive a shipper of his right under the Interstate Commerce Act, to make a through interstate shipment out of this car. Whether *or not* it was one interstate shipment is wholly a question of Federal law, and the rights of the shipper could *not* be narrowed by any state law *or* tariff, if such existed. This *for* the simple reason that any tariff, rule *or* law of Texas (if such existed) depriving one of the right to divert a shipment, would be clearly repugnant to the Interstate Commerce Act. We have learned that when Congress legislates as to interstate commerce on a subject, it is supreme.

> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other,

it is Congress and not the State that is entitled to prescribe the final and dominant rule; for otherwise Congress would be denied the exercise of its constitutional authority, and the state and not the nation would be supreme in the national field."

Houston E. & W. T. R. Co. v. U. S., 34 S. C. R. 1. c. 836; 234 U. S. 342.

In plain words, the tariffs mean as follows: The Texas tariffs says any shipments destined to points in Texas, shall be subject to all allowances as contained in the tariffs on file with the Interstate Commerce Commission. Leland's I. C. C. No. 13-S, provides for the diversion, as per the tariff of the line from which or on which the diversion takes place. All the carriers participating in the movement were parties to these tariffs (Abs. 18-19-20-21-22). So, the respondent, when it received the shipment at point of origin, knew the shipment could be lengthened to another destination. When it issued the bill of lading at Ingleside, this bill was not as a contract executed between two individuals. But it was only a receipt for the goods, also an agreement of the carrier in line with and subject to its tariffs. The tariffs govern the matter from which neither shipper nor carrier may recede, waive or change. If such is the case, the first bill of lading must be construed in the light of the respondent's tariffs, from which certain privileges of the shipper may flow.

Whether or not the respondent is the initial carrier under the Carmack Amendment, is a question of Federal law, as has been repeatedly decided. Therefore,

petitioner earnestly contends that the Federal authorities cited in this brief are controlling and that the shipment involved is only one through shipment, all of the carriers involved in the transportation so treated the matter during the transportation; the diversion was made under the tariffs, the freight was collected under the tariffs, being a through rate; petitioner believes under the authorities that any other rate collected would be illegal.

Before the liability of carriers engaged in commerce were regulated by their tariffs, rules and practices, there would be some weight to respondent's contentions, but now respondent's liability is not a matter of private contract, but is wholly a matter of tariffs. There is no question but that this was a through shipment and petitioner earnestly asks the court to grant the writ.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 118.

A. L. BRACHT, PETITIONER,

vs.

SAN ANTONIO AND ARANSAS PASS RAILWAY COMPANY.

BRIEF ON BEHALF OF RESPONDENT.

ROBERT J. BOYLE,
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BOYLE, EZELL & GROVER,
LATHROP, MORROW, FOX & MOORE,
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BRIEF ON BEHALF OF RESPONDENT.

Statement of Facts.

The plaintiff, A. L. Bracht, a resident of Rockport, Texas, brought this action against the defendant, San Antonio and Aransas Pass Railway Company, a Texas corporation, to recover damages on account of alleged negligent handling of a car of tomatoes and cucumbers. The suit was instituted in a justice court of Jackson County, Missouri, and from a judgment in favor of the plaintiff the defendant appealed to the circuit court of that county, at Kansas City, where the case was tried before a jury, resulting in a verdict and judgment

against the defendant for $481.87. After moving unsuccessfully for a new trial defendant appealed the case to the Kansas City Court of Appeals, which reversed the decision below and held for defendant; also denied a motion for rehearing. After an unsuccessful attempt to take the case to the Supreme Court of the State of Missouri, the case was brought here to this honorable court by a petition for certiorari.

The plaintiff, acting as sales agent for the Pioneer Truckers Association of Ingleside, Texas (R., 17), delivered this car of tomatoes and cucumbers to the defendant at Ingleside, Texas, on the 10th day of June, 1915, for shipment, consigned to himself at Dallas, Texas (R., 15), where plaintiff had an offer of sale if delivered in sound condition (R., 21). The defendant issued to plaintiff its contract commonly called bill of lading, the pertinent parts of which are found at pages 16 and 17 of the record.

The car was transported over defendant's lines under its bill of lading to Waco, Texas, an intermediate point, where it was turned over to the M., K. & T. Ry. Company of Texas, a connecting carrier, and taken by it to Dallas, Texas, the point of destination (R., 17, 18). It arrived at Dallas on June 12, 1915 (R., 18), and was placed on team track for delivery, and remained there until June 15th. Because the person to whom it was expected to sell the shipment refused to take it, the car was diverted or reconsigned by plaintiff to Kansas City, Missouri (R., 17). Diversion order was given by telegram on June 12, 1915, to George E. Reynolds, commercial agent for the M., K. & T. Ry. Company of Texas, at Houston, Texas (R., 18), and on June 16, 1915, the car was diverted to Kansas City (R., 17).

The original bill of lading issued by the defendant was mailed by plaintiff to E. H. Coombs, of the M., K. & T. Ry. Company, at Houston, Texas, and a new bill of lading was issued by that company covering the shipment from Dallas to Kansas City, Missouri (R., 20).

The car arrived at Kansas City on the morning of the 17th

of June, 1915 (R., 23), was delivered to Martin Ungerleider, a commission merchant (R., 22), and the shipment was handled and sold by him to the best advantage (R., 22, 23).

The plaintiff's evidence shows the contents of the car in good condition when received by defendant at Ingleside, Texas (R., 14, 27, 28), and in damaged condition on delivery by the M., K. & T. Ry. Company at Kansas City (R., 12).

There is no evidence as to the condition of the shipment at Dallas. The presumption, however, is that it was in good condition, or it would not have been diverted, as provided by Bracht's telegraphic instructions (R., 18).

The question involved in this case, briefly stated, is whether it is a purely *intrastate* shipment between Ingleside and Dallas, Texas, or an *interstate* shipment between Ingleside, Texas, and Kansas City, Missouri.

The defendant contends that, under the facts disclosed in this record, it is clearly an *intrastate* shipment so far as this defendant is concerned, namely, between Ingleside and Dallas, Texas. This is shown by plaintiff's statement filed in the justice court, wherein he alleged that the car was delivered in good condition to defendant at Ingleside, Texas, for transportation to Houston (Dallas), Texas (R., 12); by the bill of lading wherein it is specifically stated that the car was received by defendant to be transported from Ingleside to Dallas, Texas (R., 16), the bill of lading specifically stating in bold type at the very beginning that it was *"for use only between points within the State of Texas"* (R., 16), and further providing by section 2 of the conditions contained in said bill of lading, that *"this is no contract for through shipment, and this company's liability as a common carrier shall determine on tender of delivery to a connecting carrier"* (R., 16); and by section 12 of the conditions it is made subject to the regulations of the Railroad Commission of Texas (R., 16); and, furthermore, the intention of the plaintiff to make it an intrastate shipment to Dallas is shown by his testimony (R., 15, 21):

"Q. Who was the consignor or shipper at Ingleside, Texas?

"A. I was.

"Q. To whom was the shipment consigned?

"A. To me.

"Q. To where was it shipped?

"A. To Dallas, Texas.

"Q. What was the destination named in the original bill of lading issued at Ingleside, Texas?

"A. Dallas, Texas.

"Q. Did you make this shipment to fill a sale or was it consigned to Dallas, Texas, to be sold for your account?

"A. It was consigned to Dallas, Texas, to be sold in transit.

"Q. If you had had this shipment sold what was the invoice price?

"A. I had an offer of one dollar on tomatoes and fifty cents on cucumbers, delivered at Dallas, in sound condition.

"Q. Was that the price delivered at Dallas or f. o. b. Ingleside, Texas?

"A. This price was delivered at Dallas.

"Q. What would have been the freight from Ingleside, Texas, to Dallas, Texas?

"A. $75.00 on the car."

The plaintiff's theory is that because the car was diverted from point of destination—Dallas to Kansas City, Missouri—and moved in and out of that city and into Kansas City over the M., K. & T. Railway Company's line, which was the connecting line with the defendant at Waco, and because a bill of lading (R., 20) issued by this *latter* company bore a notation that it was issued in lieu of a bill of lading issued by the defendant at Ingleside (R., 21), it was and became an *interstate* shipment, and being an *interstate* shipment the defendant, as initial carrier, is liable for any damage that may have occurred anywhere between the point of origin, Ingleside, and Kansas City, the point of final destination. In support of this theory plaintiff has introduced certain

interstate tariffs (R., 23, 24, 26). The defendant contends, however, that these tariffs are not controlling in this case, for the reason that they are *interstate* tariffs and can only apply to *interstate* shipments.

The case was tried and submitted to the jury (R., 15) upon the theory of an *interstate* shipment, viz., that the defendant, being the initial carrier, could be held liable under the Interstate Commerce law for damages occurring anywhere *en route* between Ingleside, Texas, and Kansas City, Missouri.

ARGUMENT.

I.

It is beyond controversy in this case that the contract entered into between petitioner and respondent and represented by the bill of lading provided only for shipment from one point in Texas to another point in Texas, namely, wholly within the State.

It is also undisputed that the car was consigned to the petitioner himself for sale within the State of Texas, and there is nothing in the record to show that it was his intention to ship it to any other place. In fact, he had already arranged for the sale of the tomatoes shipped in the car for cash on delivery (R., 29), and that the same was not consummated only because the consignees "would not accept on account of the cucumbers in the car" (R., 28), and not until then did petitioner conceive the idea of shipping it beyond the confines of the State, and made arrangements so to do by telegram to the commercial agent of the Missouri, Kansas & Texas Railway Company, pursuant to which the original bill of lading from Ingleside to Dallas was surrendered and a new or exchange bill of lading was received for the shipment to Kansas City (R., 18–21).

Under these circumstances, we maintain that the shipment over the line of the respondent company was purely

an intrastate shipment, which was completed when the car reached Dallas, Texas, and that its subsequent interstate shipment to Kansas City, Missouri, was a wholly new and independent matter with which this respondent had no concern. It was not a continuation of the original transportation, but a new movement wholly outside of the contemplation of the parties when the original contract was entered into, and resulting from later happenings which were not then contemplated, namely, the refusal of the commission merchant at Dallas to purchase the tomatoes in accordance with his previous understanding and the petitioner's resulting change of purpose and his shipping to another market in an effort to find a new purchaser.

The court below, in reversing the opinion of the trial court, relied largely upon the authority of the case of *Gulf, Colorado & Santa Fe Railway Company vs. Texas*, 204 U. S., 403, and we submit properly so, because the exact question here involved was considered and decided there. The only difference between the cases is that in the one cited the shipment was corn going into Texas, while in the case at bar it was vegetables coming out of Texas. In the former case this court, through Mr. Justice Brewer, held as follows:

> "It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation. But whether it be one or the other may depend on the contract of shipment. The rights and obligations of carriers and shippers are reciprocal. The first contract of shipment in this case was from *Hudson to Texarkana*. During that transportation a contract was made at Kansas City for the sale of the corn, but that did not affect the character of the shipment from Hudson to Texarkana. It was an interstate shipment after the contract of sale as well as before. In other words, the transportation, which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from *Hudson to Texarkana*—that is, an interstate shipment. The

control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier. Neither the Harroun nor the Hardin Company changed or offered to change the contract of shipment, or the place of delivery. The Hardin Company accepted the contract of shipment theretofore made and purchased the corn to be delivered at Texarkana—that is, on the completion of the existing contract. When the Hardin Company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligation to carry it further. It transferred the corn in obedience to the demands of the owner, to the Texas and Pacific Railway Company, to be delivered by it, under its contract with such owner. Whatever obligation may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not as carrier, but simply as a forwarder. No new arrangement having been made for transportation, the corn was *delivered to the Hardin Company at Texarkana*. Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn, was a matter immaterial so far as the completed transportation was concerned.

In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the State wherein that carriage was to be made.

> "The question may be looked at from another point of view. Suppose a carload of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation, and suppose that the laws of Texas required, subject to penalty, that such goods should be carried in a particular kind of car, can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended after the goods had reached Texarkana to forward them to some other place outside the State? To state the question in other words, if the only contract of shipment was for local transportation would the State law in respect to the mode of transportation be set one side by a Federal law in respect to interstate transportation on the ground that the shipper intended after the one contract of shipment had been completed to forward the goods to some place outside the State? (*Cox vs.* Errol, 116 U. S., 517-527.)"

The *case of Cox vs.* Errol *(supra)* involved the taxing power of the State of New Hampshire over certain spruce logs that had been drawn down from another location in the State during the preceding winter and placed in Clear Stream and on the banks thereof in the town of Errol, New Hampshire, "to be from thence floated down the Androscoggin River to the State of Maine to be manufactured and sold." This court held, through Mr. Justice Bradley, that the logs were a part of the general property of the State, and continue to be such until they have entered upon their final journey for leaving the State and going into another State. After quoting from the *case of The Daniel Ball*, 10 Wallace, 565, as to interstate commerce commencing whenever a commodity has begun to move as an article of trade from one State to another, it was thus held:

> "But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles or even floating

> them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a State of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

These words apply very appositely to the facts of the present case. The vegetables which constituted the commodity here were shipped to a point wholly within the State of Texas for the purpose of sale within that State, and were not started on a journey to another State. At the time of the shipment it was not only the probability, but the completed intention of the shipper, that they should be "sold or otherwise disposed of within the State and never put in course of transportation out of the State." Not until subsequently and after a change of circumstances, resulting in a change of intention on the part of the shipper, were they "started on their final journey out of the State."

If there be any distinction in principle between the two cases it is in favor of the shipment here being wholly intrastate, because at the time it was made there was no intention of transporting the products to another State, whereas in *Coe v. Errol* there was every intention of sending the logs to the State of Maine, dating way back to the severance of the logs from the soil and their first placing upon the waters of Clear Stream.

That Coe *vs.* Errol and the case of *Daniel Ball* have not been modified, but, on the contrary, have been reaffirmed by Railroad Commission *vs.* Worthington, 225 U. S., 101, and some of the other authorities upon which petitioner here relies, was held by the recent decision of this court, delivered through Mr. Chief Justice White, in the case of McCluskey *vs.* Marysville & Northern Railway Company, 243 U. S., 36, which also involved some logs cut within a State for transportation outside of the State. While the facts of the latter case are different from those of the instant case, yet the conclusion of the court that the selling of the poles, "or whether they were going outside of the State, depended upon chance or the exigencies of trade," applies quite as well here. It was by a mere chance or the exigencies of trade that Bracht did not sell his vegetables at Dallas, as he had fully intended and arranged to do, but by a change of intention had them shipped to a city within another State.

To the same effect is the decision of this court in Chicago, Milwaukee & St. Paul Railway Company *vs.* Iowa, 233 U S., 334, which involved shipments of coal from points in Illinois to Davenport, Iowa, and later shipments from Davenport to other points in Iowa without any unloading or reloading—in other words, transportation in the same car. This court held, with the Supreme Court of the State, that the later shipments were intrastate. And, further, that:

> "It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract. * * * But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement, or prevent the reshipment to a point within the same State from having an independent and intrastate character."

In the present case "the essential character of the commerce," to wit, its being perishable vegetables, was such as to render more likely a shipment as intrastate than interstate. Accordingly, not only the billing and the form of the contract, but the essential character of the commerce here sustain the contentions of the carrier.

These authorities were cited and considered at some length by the Interstate Commerce Commission in the case of Illinois Grain to Chicago, 40 I. C. C., 124, and the shipment of grain to Chicago, with intention of storing it in elevators, and of then shipping it to Buffalo or other lake ports outside of the State of Illinois, was held to be intrastate commerce. Even a dissenting opinion of Commissioner Harlan in that case does not weaken our contentions here, as he sets forth that in the decisions of this court as to whether particular commerce was intrastate or interstate *"the distinction made has ultimately rested upon the intention of the shipper;* that is to say, where freight is put in transit with the intention, at the time, of shipping it to a point outside the State, the character of the transportation has been held to be interstate, irrespective of the billing used or the method of reshipping employed." *A fortiori,* if the intention at the time of putting the freight in transit is to ship it to a point within the State, the character of the transportation is intrastate.

The decisions of the State courts are also in harmony with this view.

M., K. & T. Ry. Co. of Texas *vs.* Pace, 184 S. W. (Tex.) 1052, l. c. 1054;
Wien *vs.* R. R. Co., 152 N. Y. Sup., 154;
Kolkmeyer *vs.* Railroad Co., 192 Mo. App., 188;
Smith & Son *vs.* Railroad Co., 177 Mo. App., 269;
Keithley & Quinn *vs.* Lusk, 195 Mo. App., 143;
Reynolds *vs.* Railroad Co., 195 Mo. App., 215;
Saw Mill Co. *vs.* Railroad Co., 194 Mo. App., 618.

The decisions ordinarily cited in favor of a contention as to commerce being interstate in character, and part of which are relied upon by petitioner here, are found upon examination to be not inconsistent with our contentions. Thus in Railroad Commission *vs.* Worthington, 225 U. S., 101, the commerce there found to be interstate was "lake-cargo coal," transported from the coal fields in eastern Ohio to the ports of Huron and Cleveland, on Lake Erie, for carriage thence to other States by lake vessels. It was found by the United States circuit court, also by the circuit court of appeals, and finally by this court, that practically all of the coal so transported was intended for points in other States or in Canada. This court concludes, in an opinion delivered by Mr. Justice Day, that "by every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, *intended by the parties to be such*," and that "a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels ready to be carried beyond the State destination." At the same time, the case was distinguished from that of Gulf, C. & S. F. R. Co. *vs.* Texas (*supra*).

Again, in Texas & New Orleans Ry. Co. *et al. vs.* Sabine Tram Company, 227 U. S., 111, there were involved shipments of lumber from Ruliff to Sabine, Texas, for the purpose of loading it upon vessels at that port and transporting it to different points in Europe and which was intended for export at the time of its purchase and, indeed, had been contracted for future delivery before its transportation was arranged for. In a lengthy opinion, delivered by Mr. Justice McKenna, the court held that it could have no hesitation in pronouncing the shipments to have been in interstate commerce, and that this conclusion directly follows from the last finding of fact, namely, that such shipments, together with other shipments to Sabine and Sabine Pass, "constitute a large and constantly recurring course of foreign commerce passing out through the port of Sabine." The cases of Coe

vs. Errol and Gulf, C. & S. F. R. Co. *vs.* Texas (*supra*) were both cited and distinguished. It was held that, as in other similar cases, "the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured, and shipped, and to give it a various character by the steps in its transportation would be extremely artificial."

In conclusion, the court held in the Sabine case that "the shipment was not an isolated one, but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber, and in the year 1906 to 39,554,000 feet." These words are especially significant in the present case, because the shipment from Dallas to Kansas City was an isolated one, and there is nothing in the record to show that Bracht usually shipped to Kansas City or any other point outside of the State of Texas.

Again, in Southern Pacific Terminal Company *vs.* Interstate Commerce Commission, 219 U. S., 498, the product involved was cotton-seed cake and cotton-seed meal, purchased chiefly in Texas, but partly in Oklahoma, Louisiana, and Arkansas, and shipped on bills of lading and waybills to Galveston, but for the purpose of export, there being no consumption of the product at Galveston. It was therein held that the manufacture and concentration of the product on the wharves of the terminal company were but incidents in the transhipment of the product in export trade, and that their regulation was within the power of the Interstate Commerce Commission. The fact that the shipments were not made on through bills of lading was held to be immaterial, in view of the circumstance that they were all destined for export.

We believe that in every single case which has been or could be cited by petitioner the fact appears that the shipment was intended to be a portion of the ultimate shipment known

to and understood by both shipper and carrier; that, irrespective of the form of billing, the shipment was intended from the outset to be interstate, and that from its essential nature it could only be such. Accordingly, the situation is wholly different from that in the case at bar, where the shipment was of fresh vegetables, easily perishable in their nature, known and intended to be shipped only to another point in the same State, and which merely by an accident, or at least by an unforeseen circumstance, was diverted subsequent to the completion of its transportation and by a later arrangement sent without the confines of the State. For the petitioner to cite here such cases as Railroad Commission *vs.* Worthington or Southern Pacific Terminal Company *vs.* Interstate Commerce Commission (*supra*) only serves to demonstrate that he could not have thoroughly understood the principles upon which those cases were decided and the way in which they were distinguished from Coe *vs.* Errol, Gulf, C. & S. F. Ry. Co. *vs.* Texas, C., M. & St. P. Ry. Co. *vs.* Iowa, and other cases cited above.

When the respondent here accepted from Bracht the shipment of tomatoes and cucumbers, it did so knowing that same would be sent only a short journey within the State, and accordingly to hold it liable for a subsequent and much longer trip outside of the State would be unreasonable. If it is to answer in damages for the later shipment to Kansas City, it would be equally liable if the vegetables had instead been sent to New York, or San Francisco, or even transported from thence abroad. In other words, while the carrier could and did take precautions to see that the vegetables were carefully packed for the short shipment within the State of Texas, it had no reason to use greater care as to a much longer shipment outside of the limits of the State which the shipper might subsequently by some change of intention or through the happening of some untoward circumstance decide to make. The "essential character of the commerce"

should be considered in this case as in other cases, both with regard to whether it was interstate or intrastate commerce and with regard to the liability of the initial carrier.

II.

There is no showing by plaintiff in the record as to the condition of the shipment and the damages, if any, at Dallas, and for that reason the demurrer should have been sustained. In other words, respondent's responsibility terminated at Dallas, so that it was incumbent upon petitioner to show the condition of the shipment at that point and what damages, if any, had been sustained. If any presumption at all be indulged, it is that the shipment arrived at Dallas in good condition.

It is now a well-established and fundamental principle in the law of carriers that where goods are delivered in good condition to the initial carrier and are found to be in a damaged condition, due to negligence, when delivered by the connecting or terminal carrier, and it is not shown which carrier was guilty of negligence, the presumption is that it is the negligence of the last carrier.

In Keithley & Quinn *vs.* Lusk, 195 Mo. App., 143, the court says:

> "We will also grant that where goods are delivered in good condition to the initial carrier and are found to be damaged, due to negligence, when delivered by the terminal carrier, and it is not shown which carrier was guilty of negligence, the presumption is that it is the negligence of the last carrier (Hurst *vs.* R. R., 117 Mo. App., l. c. 38; Bockerman *vs.* Railroad, 169 Mo. App., 168; 152 S. W., 389)."

The same rule is announced in Zerilli *vs.* Ross, 198 S. W. (Mo. App.), l. c. 488; also Moore on Carriers, sec. 11, p. 468. This doctrine is so firmly established in the State where

this case arose that it seems to be unnecessary to discuss it further.

If we are right in our contention that this shipment, so far as the respondent is concerned, must be treated as an *intrastate* shipment ending at Dallas, Texas, then we are confident that petitioner's counsel will not seriously contend that he has met the burden of proof put upon him as to the condition of the shipment at that point. In other words, the presumption is that damages, if any, occurred after the shipment left the defendant's line, and this has not been overcome by any evidence offered by the plaintiff. In fact, the car was diverted and reshipped from Dallas on his order after it was found to be in good condition (R., 18, 19, 20).

Conclusion.

We submit that the decision of the Kansas City Court of Appeals was eminently correct, in view of the facts of this case and in the light of the authorities governing it, and we accordingly pray that that decision be affirmed.

Respectfully sumbitted,

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